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No. 98-404-ATX

Title: Department of Commerce, et al., Appellants  
v.  
United States House of Representatives, et al.

Docketed:  
September 4, 1998

Court: United States District Court  
for the District of Columbia

Entry Date

Proceedings and Orders

Sep 4 1998 Statement as to jurisdiction filed. (Response due October 4, 1998)

Sep 9 1998 Motion of the parties jointly to expedite consideration of the Jurisdictional Statement filed.

Sep 10 1998 Motion of the parties jointly to expedite consideration of the Jurisdictional Statement GRANTED.

Sep 10 1998 PROBABLE JURISDICTION NOTED. The briefs of the appellants and intervenor-defendants are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, October 6, 1998. The briefs of appellees are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 3, 1998. The reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 17, 1998. Rule 29.2 does not apply. Oral argument is set for Monday, November 30, 1998.  
SET FOR ARGUMENT November 30, 1998.  
\*\*\*\*\*

Sep 16 1998 Waiver of right of appellees Legislature of the State of California, et al. to respond filed.

Sep 23 1998 Waiver of right of appellees Richard Gephardt, et al. to respond filed.

Sep 24 1998 Waiver of right of appellees Nat. Korean American Service & Education Consortium, et al. to respond filed.

Oct 5 1998 Brief of appellant Department of Commerce filed. VIDED.

Oct 5 1998 Joint appendix filed. VIDED.

Oct 6 1998 Motion of Jerome Gray, et al. for leave to file a brief as amici curiae filed.

Oct 6 1998 Brief of appellees California Legislature, et al. filed.

Oct 6 1998 Brief of appellees Natl. Korean American Serv. & Education Consortium, et al. filed.

Oct 6 1998 Brief of appellees City of Los Angeles, et al. filed.

Oct 6 1998 Brief amici curiae of Brennan Center for Justice, et al. filed.

Oct 6 1998 Brief of appellees Richard Gephardt, et al. filed.

Oct 6 1998 Brief amicus curiae of County of Westchester filed.

Oct 6 1998 Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed.

Oct 6 1998 Brief amicus curiae of The Japanese American Citizens League filed.

Oct 6 1998 Brief amici curiae of Am. Federation of State, Co., and Mun. Employees, et al. filed.

Oct 6 1998 Brief amicus curiae of Texas filed.

Oct 13 1998 Motion of Jerome Gray, et al. for leave to file a brief as amici curiae GRANTED.

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Entry Date

## Proceedings and Orders

Oct 15 1998 Application (A98-303) to file a brief on the merits in excess of page limits, submitted to The Chief Justice.

Oct 16 1998 Application (A98-303) denied by the Chief Justice.

Oct 16 1998 Motion of appellees for divided argument filed.

Oct 28 1998 CIRCULATED.

Nov 2 1998 Motion of appellees for divided argument GRANTED.

Nov 2 1998 Brief amici curiae of Wisconsin and Pennsylvania filed.

Nov 3 1998 Brief amicus curiae of Foundation to Preserve the Integrity of the Census filed.

Nov 3 1998 Brief amici curiae of Washington Legal Foundation, et al. filed.

Nov 3 1998 Brief amici curiae of National Citizens Legal Network, et al. filed.

Nov 3 1998 Brief of appellee United States House of Representatives filed.

Nov 17 1998 Reply brief of appellees National Korean American Service & Education Consortium, et filed.

Nov 17 1998 Reply brief of appellees California Legislature, et al. filed. VIDED.

Nov 17 1998 Reply brief of appellees City of Los Angeles, et al. filed. VIDED.

Nov 17 1998 Reply brief of appellants Department of Commerce, et al. filed.

Nov 17 1998 Reply brief of appellees Richard A. Gephardt, et al. filed. VIDED.

Nov 30 1998 ARGUED.

98 404 SEP 4 1998

No.

OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1997

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
APPELLANTS

*v.*

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**JURISDICTIONAL STATEMENT**

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### QUESTIONS PRESENTED

1. Whether the instant case, which involves a suit filed by the United States House of Representatives challenging the Secretary of Commerce's current plan for the year 2000 census, presents a justiciable controversy satisfying the requirements of Article III of the Constitution.

2. Whether the Census Act, 13 U.S.C. 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

3. Whether the Census Clause of the Constitution, Article I, Section 2, Clause 3, which requires Congress to conduct an "actual Enumeration" of the population, prohibits the use of statistical sampling in determining the population for the purpose of apportioning Representatives among the States.



## II

### **PARTIES TO THE PROCEEDINGS**

The appellants here, who were the defendants in the district court, are the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census. The United States House of Representatives was the plaintiff in the district court and is an appellee in this Court. The following were intervenor-defendants in the district court: Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M. Slaughter; Bennie G. Thompson; Carolyn Maloney; Christopher Shays; Tom Sawyer; Rod Blagojevich; Bobby Rush; Luis Guitierrez; John Conyers; Jose Seerano; Cynthia McKinney; Charles Eangel; Donald Payne; Howard Berman; Xavier Beccera; Loretta Sanchez; Julian Dixon; Henry Waxman; Maxine Waters; Esteban Torres; Sheila Jackson Lee; Legislature of the State of California; The California Senate; John Burton, individually and as President Pro Tempore of the California Senate; Antonio Villaraigosa, individually and as Speaker of the California Assembly; City of Los Angeles, California; City of New York, New York; County of Los Angeles, California; City of Chicago, Illinois; City and County of San Francisco, California; Miami-Dade County, Florida; City of Inglewood, California; City of Houston, Texas; City of San Antonio, Texas; City and County of Denver, Colorado; City of Cudahy, California; City of Long Beach, California; City of Long Beach, California; City of San Bernardino, California; City of Detroit, Michigan; City of Bell, California; City of Huntington Park, California; City of San Jose, California; City of Stamford, Connecticut; City of

## III

Oakland, California; County of Santa Clara, California; County of San Bernardino, California; County of Alameda, California; County of Riverside, California; State of New Mexico; National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California, Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim; Adeline M.L. Yoong; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra; U.S. Conference of Mayors; League of Women Voters of Los Angeles; Robert Menendez; Ed Pastor; Silvestre Reyes; Ciro Rodriguez; and Carlos Romero-Barcelo. Pursuant to Rule 18.2 of the Rules of this Court, they are deemed parties in this Court.

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**In the Supreme Court of the United States**

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UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**JURISDICTIONAL STATEMENT**

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**OPINION BELOW**

The opinion of the district court (App., *infra*, 1a-67a) is not yet reported.

**JURISDICTION**

The judgment of the district court (App., *infra*, 66a-67a) was entered on August 24, 1998. A notice of appeal (App., *infra*, 68a-69a) was filed on August 25, 1998. The jurisdiction of this Court is invoked under the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482.



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clause 3 of the United States Constitution is reproduced at App., *infra*, 70a.
2. Sections 141 and 195 of Title 13, United States Code, are reproduced at App., *infra*, 70a-74a.
3. Section 209 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2480-2483, is reproduced at App., *infra*, 75a-80a.

## STATEMENT

This case involves a statutory and constitutional challenge to the Commerce Department's plan to employ statistical sampling in conducting the decennial census for the year 2000. In the proceedings below, the District Court for the District of Columbia held that the Department's plan was inconsistent with the Census Act, 13 U.S.C. 1 *et seq.* (1994 & Supp. II 1996), and was therefore unlawful. App., *infra*, 1a-67a. Congress has vested this Court with direct appellate jurisdiction over the district court's decision. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482.

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives \* \* \* shall be apportioned among the several States \* \* \* according to their respective Numbers" (the Apportionment Clause). It also directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years,

in such Manner as they shall by Law direct" (the Census Clause). *Ibid.* See also Amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

2. Pursuant to the Census Clause, Congress has provided in the Census Act that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. 141(a). The "tabulation of total population by States" for the purpose of apportionment of Representatives is to be completed and reported by the Secretary to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Within one week after the beginning of the first Session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State \* \* \* and the number of Representatives to which each State would be entitled" under the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 451-455 (1992). Within 15 days after receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. 2a(b) (Supp. II 1996).

The Census Act provides that the Secretary may conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). The Act further states that "[e]xcept for the determination of population for purposes of apportionment of

Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195.

3. Each of the decennial censuses conducted in the United States is believed to have undercounted the country's actual population. *Wisconsin v. City of New York*, 517 U.S. 1, 6 (1996). The 1970, 1980, and 1990 censuses are estimated to have undercounted the population by 2.7%, 1.2%, and 1.6%, respectively. *Id.* at 6-7, 20. The Census Bureau has also concluded that members of certain groups—in particular, members of racial and ethnic minorities—are more likely to be missed in the census than are other United States residents, a phenomenon known as a "differential undercount." See *id.* at 7; App., *infra*, 3a-4a.

In preparing for the 1990 census, the Commerce Department devoted extensive consideration to the possibility of using large-scale statistical sampling to address the undercount and differential undercount. The methodology considered by the Department involved an intensive postenumeration survey (PES) of particular representative geographical areas. By comparing the data obtained from the PES with the "raw" census figures for the same geographical areas, and by extrapolating the results of that comparison across the country as a whole, the Department produced adjusted census figures for each of the States and their political subdivisions. See *City of New York*, 517 U.S. at 8-10. For a variety of reasons, however, the Secretary ultimately determined that the unadjusted rather than the adjusted counts should be used as the official census figures. See *id.* at 10-12; 56 Fed. Reg.

33,582 (1991).<sup>1</sup> This Court upheld that decision against constitutional challenge in *City of New York*. See 517 U.S. at 24.

4. Shortly after the Secretary decided against adjustment of the 1990 census figures, Congress passed the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (13 U.S.C. 141 note). The Act directed the Secretary to contract with the National Academy of Sciences to study "means by which the Government could achieve the most accurate population count possible." *Id.* § 2(a)(1), 105 Stat. 635. The Academy was instructed to consider, *inter alia*, "the appropriateness of using sampling methods, in combination with basic data-collection techniques or otherwise, in the acquisition or refinement of population data, including a review of the accuracy of the data for different levels of geography (such as States, places, census tracts and census blocks)." *Id.* § 2(b)(1)(C), 105 Stat. 635. The Academy established three panels, all of which "concluded that traditional census methods needed to be modified in response to societal changes, and that statistical sampling techniques would both increase the census' accuracy and lower its cost." App., *infra*, 4a.

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<sup>1</sup> In explaining his decision against adjustment of the 1990 census figures, the Secretary did not assert that an adjustment would violate either the Constitution or the Census Act. To the contrary, he stated that "[w]hile not free from doubt, it appears that the Constitution might permit a statistical adjustment, but only if it would assure an accurate population count," 56 Fed. Reg. at 33,605; and he observed that "[w]hile judicial opinion is unsettled on the question \* \* \*, the majority of courts considering this issue have ruled that [13 U.S.C. 195] permits an adjustment if the adjustment method makes the census more accurate," *id.* at 33,606.



In 1997, Congress passed a bill that would have amended 13 U.S.C. 141(a) to provide that, "[n]otwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in [C]ongress among the several States." H.R. 1469, 105th Cong., 1st Sess., Tit. VIII(b)(1), at 65. The President vetoed that bill. See 33 Weekly Comp. Pres. Doc. 846 (June 9, 1997) (veto message). The President's veto message explained that he regarded the sampling prohibition as objectionable because "[w]ithout sampling, the cost of the decennial census will increase as its accuracy, especially with regard to minorities and groups that are traditionally undercounted, decreases substantially." *Id.* at 847. Shortly thereafter, Congress enacted legislation directing the Department of Commerce "within thirty days of enactment of this Act to provide to the Congress a comprehensive and detailed plan outlining its proposed methodologies for conducting the 2000 decennial Census and available methods to conduct an actual enumeration of the population." Pub. L. No. 105-18, Tit. VIII, 111 Stat. 217.

Pursuant to that statutory directive, the Department of Commerce subsequently forwarded to Congress a detailed report describing the methods by which it planned to conduct the 2000 census. See Bureau of the Census, U.S. Dep't of Commerce, *Report to Congress—The Plan for Census 2000* (Aug. 1997) (*Report to Congress* or *Report*). The *Report to Congress* described a variety of new mechanisms—*e.g.*, an improved master address file, new outreach methods, and new technologies designed to detect and eliminate multiple responses from the same household—that the Census Bureau intended to use in the initial phase of

the census. *Id.* at 19-22. The *Report* also confirmed the Census Bureau's intention to make use of statistical sampling techniques that the Bureau had concluded would increase the accuracy of the 2000 census while reducing its cost. See *id.* at 23-32.<sup>2</sup> The *Report* stated that "[a]ll significant departures from the methodologies used in previous censuses have been endorsed by the [National Academy of Sciences], the Bureau's advisory committees, and the scientific community." *Id.* at x. It observed as well that "[t]he Plan for Census 2000 has received strong support from professional statisticians and demographers—experts are convinced that

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<sup>2</sup> Two forms of statistical sampling are at issue in this litigation. First, the Commerce Department intends to use sampling in the Nonresponse Follow-Up (NRFU) phase of the census. In the 1990 census, approximately 65% of all U.S. households returned the census forms provided to them by mail. Census Bureau enumerators visited non-responding households as many as six times before relying on other means to attempt to ascertain the number of persons residing there. For the 2000 census, the Commerce Department plans to secure information from a randomly selected sample of non-responding households, and to infer the likely number of persons living in other non-responding units based on the sample data. *Report to Congress* at 26-29; App., *infra*, 6a-7a.

Second, after the initial phase of the census, the Commerce Department plans to conduct a survey of approximately 750,000 housing units furnishing a representative sample of a wide variety of demographic groups, defined by such categories as race, age, urban vs. rural place of residence, and status as a homeowner or renter. By comparing the results of that survey to those of the initial phase of the census, the Department can assess the frequency with which persons having particular demographic characteristics were missed in the initial phase. By extrapolating the results of the sample, the Bureau will determine population figures for States and political subdivisions nationwide. *Report to Congress* at 29-32; App., *infra*, 7a-9a.



the introduction of a limited use of scientific sampling in Census 2000 will result in a more accurate, less costly census." *Ibid.*

After receiving the *Report to Congress*, Congress enacted the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440. Section 209(b) of that Act provides that

[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

111 Stat. 2481. Section 209(c)(2) states that the *Report to Congress*, together with the Commerce Department's Census 2000 Operational Plan, "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding." 111 Stat. 2482. Section 209(d) identifies "either House of Congress" as "an aggrieved person" within the meaning of Section 209(b). 111 Stat. 2482. Section 209(e)(1) states that any civil action brought pursuant to the Act shall be heard by a three-judge district court, whose decision is reviewable by appeal directly to this Court. *Ibid.*

5. The plaintiff in this case (appellee in this Court) is the United States House of Representatives. The House filed suit pursuant to the judicial review

provision of Section 209(e)(1), contending that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act and Article I, Section 2, Clause 3 of the Constitution. The Department of Commerce, the Census Bureau, and two individual Commerce Department officials (collectively Commerce Department) were named as defendants. The Commerce Department moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. The House moved for summary judgment. The district court denied the Commerce Department's motion to dismiss, as well as motions to dismiss filed by four groups of intervenor-defendants, and granted the House's motion for summary judgment. App., *infra*, 1a-67a.

a. The district court first concluded that the House possessed a cognizable stake in the controversy, explaining that the House had "properly alleged a judicially cognizable injury through [1] its right to receive information by statute and through [2] the institutional interest in its lawful composition." App., *infra*, 16a. With respect to the first claim of injury, the court observed that the President is required by 2 U.S.C. 2a(a) to "transmit to the Congress a statement showing the whole number of persons in each State \* \* \* as ascertained under the \* \* \* decennial census of the population." App., *infra*, 16a. The court stated that "[i]f statistical sampling in the apportionment census violates the Census Act or the Constitution, Congress will not receive information that it is entitled to by statute." *Id.* at 17a. The court concluded that Congress's "fail[ure] to receive census information to which it is entitled as a matter of law" would effect a "con-

crete and particularized" injury to the House. *Id.* at 20a.

With respect to the second claim of injury, the House contended that an unlawfully conducted census "would necessarily result in the unlawful composition of any House elected and seated pursuant to the resulting apportionment." App., *infra*, 20a. The district court acknowledged that the House will continue to be composed of 435 Representatives regardless of the manner in which the 2000 census is conducted. *Id.* at 21a. Relying primarily on this Court's decision in *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), however, the district court held that "a legislative body has a judicially cognizable interest in matters affecting its composition so as to satisfy Article III, whether or not the challenged conduct will ultimately have an effect on the size of the body." App., *infra*, 22a.

The district court also held that the current House of Representatives for the 105th Congress could properly assert the interests of the House of Representatives that will convene during the 107th Congress in the year 2001, when the President's apportionment statement is transmitted to Congress. App., *infra*, 22a-26a. The court concluded as well that the threatened injury was sufficiently immediate to satisfy constitutional requirements. *Id.* at 28a-37a.

b. On the merits, the district court held that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act. The court first determined that 13 U.S.C. 195, as originally enacted in 1957, unambiguously prohibited the use of sampling in the congressional apportionment process. App., *infra*,

48a-49a.<sup>3</sup> The court concluded that the 1976 amendments to the Census Act did not eliminate that prescription. It noted that the Commerce Department in 1980 "took the position that statistical sampling in connection with the apportionment enumeration remained prohibited." *Id.* at 50a. The court also believed that the text of Section 195 in its current form is most naturally read to forbid the use of statistical sampling for apportionment purposes. *Id.* at 50a-54a. Finally, the court examined the legislative history of the 1976 amendments and found no indication that Congress had intended to alter existing law regarding the use of sampling in connection with the apportionment process. *Id.* at 54a-59a.

The district court also rejected the Commerce Department's argument that Section 141(a) affirmatively authorizes the use of sampling in determining the population for purposes of apportioning Representatives. App., *infra*, 59a-64a. Even assuming that Section 141(a) might otherwise be read to authorize sampling for apportionment purposes, the court held, Section 195 is "more specific[ally]" directed to the issue of sampling and is "therefore controlling to the extent that the two provisions conflict." *Id.* at 61a. The court concluded that "while § 141 permits sampling techniques and surveys in the conduct of the decennial census, that general grant is subject to the more specific 'Use of Sampling' directive in § 195, which \* \* \* explicitly proscribes the use of sampling for apportion-

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<sup>3</sup> As enacted in 1957, Section 195 provided that "[e]xcept for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195 (1958); see App., *infra*, 48a.



ing representatives among the states." *Id.* at 62a. The court also found no evidence in the legislative history of Section 141(a) suggesting that Congress intended that provision to authorize the use of sampling in the apportionment of Representatives. *Id.* at 62a-64a.

c. Because the district court concluded that the Secretary's plan for the 2000 census violated the Census Act, it declined to address the question whether the plan was consistent with Article I, Section 2, Clause 3 of the Constitution. App., *infra*, 64a.

#### THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Congress has vested this Court with direct appellate jurisdiction over district court decisions in suits challenging the Commerce Department's plan for the year 2000 decennial census. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. This case falls squarely within the Court's appellate jurisdiction under that statutory provision. The district court erred both in holding that this suit presents a justiciable case or controversy under Article III of the Constitution, and in holding that the use of statistical sampling in determining population figures for the apportionment of Representatives among the States would violate the Census Act.

1. A definitive ruling by this Court regarding the legality of the Commerce Department's plan for the 2000 census would have significant practical advantages. The Framers of our Constitution, however, did not empower the federal courts to issue advisory opinions. Article III empowers the federal courts to resolve only those disputes that present actual "Cases"

or "Controversies." The present suit does not satisfy that fundamental constitutional requirement.

a. The district court erred in holding (App., *infra*, 18a) that the House of Representatives had alleged "an 'informational injury' sufficiently concrete so as to satisfy the irreducible constitutional minimum of Article III." The 107th Congress will take office in January 2001. Within one week of the beginning of the first regular session of that Congress, the President must "transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the \* \* \* decennial census of the population, and the number of Representatives to which each State would be entitled." 2 U.S.C. 2a(a). Nothing in the Commerce Department's plan for the 2000 census suggests, and the House does not contend, that the President will fail to transmit to Congress the number of persons in each State "as ascertained under the \* \* \* decennial census." Rather, the gravamen of the House's claim of harm is that the (allegedly unlawful) manner in which the Secretary intends to conduct the census will inevitably affect the character of the data provided to Congress pursuant to Section 2a(a), thereby depriving the House of data to which it believes itself to be statutorily entitled.

To treat that alleged harm as a judicially cognizable "informational injury" would permit Congress to give itself a cognizable interest in the outcome of *any* Executive Branch decision, simply by requiring executive officials to report that decision to Congress. Whenever the Executive Branch is required by statute to inform Congress of its activities, the manner in which those activities are performed will affect the character and/or quantity of the information provided to the



legislature.<sup>4</sup> To permit such an "injury" to serve as the predicate for a judicial determination of the legality of the underlying action would vest Congress with a substantial institutional role in the execution of the laws, in violation of fundamental separation-of-powers principles. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam); *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).<sup>5</sup>

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<sup>4</sup> The district court attempted to cabin the effect of its decision by asserting that "the information sought by the House here is necessary to perform a constitutionally mandated function." App., *infra*, 17a. Contrary to the court's suggestion, however, under the existing statutory scheme neither House of Congress plays any role in the apportionment process after the transmittal by the President to Congress (see 2 U.S.C. 2a(b) (Supp. II 1996)) of "the whole number of persons in each State" and "the number of Representatives to which each State would be entitled." Rather, "[i]t shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of [the census figures from the President], to send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. 2a(b) (Supp. II 1996). The figures transmitted by the President are binding upon the Clerk. See *ibid.* ("Each State shall be entitled \* \* \* to the number of Representatives shown in the statement required by subsection (a) of this section"); *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992) ("It is not until the President submits the information to Congress that the target stops moving, because only then are the States entitled by § 2a to a particular number of Representatives."); *id.* at 799 ("it is the President's personal transmittal of the report to Congress that settles the apportionment"); *id.* at 824 (Scalia, J., concurring in part and concurring in the judgment) (noting "the Clerk's purely ministerial role" in the apportionment process).

<sup>5</sup> The Commerce Department has not yet been provided with the funds necessary to complete the 2000 census, and it will therefore be able to carry out that task only if Congress enacts new appropriations measures. Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992) (particularly when "the acts

b. The district court also erred in holding that the House of Representatives "has a judicially cognizable interest in matters affecting its composition" sufficient to bring this suit within the requirements of Article III. App., *infra*, 22a. Regardless of the manner in which the 2000 census is conducted, the 107th and subsequent Houses will continue to be composed of 435 Members and will continue to exercise the same constitutional powers. Whatever effect the census and resulting apportionment process may have on individual Members (or aspiring Members)—and any such effect is entirely speculative at the present time—it will impose no injury on the House as a collective body.<sup>6</sup>

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necessary to make the injury happen are at least partly within the plaintiff's own control," the Court "ha[s] insisted that the injury proceed with a high degree of immediacy"). Moreover, both the propriety and the legality of statistical sampling have been the subject of extensive debate within the political Branches. It cannot be said with any certainty that a majority of the 107th House will share the current House's opposition to the use of statistical sampling in connection with the 2000 decennial census. The current House is therefore an inappropriate representative of the future legislative bodies that will allegedly suffer injury if the census is ultimately conducted in accordance with the Secretary's plan.

<sup>6</sup> In reaching the contrary conclusion, the district court principally relied (see App., *infra*, 20a-22a) on this Court's decision in *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972). The court's reliance on that decision was misplaced. In *Beens*, the Minnesota State Senate sought to appeal from a federal district court judgment holding the state legislature to be malapportioned and directing the adoption of a new apportionment plan—one that would have reduced from 67 to 35 the number of state senators. *Id.* at 188-193. The Court held that "the senate is an appropriate legal entity for purpose of intervention and, as a consequence, of an appeal in a case of this kind." *Id.* at 194.

2. The district court also erred on the merits in holding that the Census Act precludes the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States. The Act directs the Secretary to "take a decennial census of population as of the first day of April of [the census] year, \* \* \* in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). Because no other provision of law authorizes the Secretary to conduct the "actual Enumeration" required by Article I, Section 2, Clause 3, it is apparent that the "decennial census" mandated by Section 141(a) is to be used in apportioning Representatives among the States. Cf. *City of New York*, 517 U.S. at 19 (citing Section 141(a) as the provision by which "Congress has delegated its broad authority over the census to the Secretary.").

Other features of the statutory scheme reinforce that conclusion. Thus, Section 141(b) refers to "[t]he tabulation of total population by States *under subsection (a)*

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*Beens* makes clear that a state legislative body suffers a cognizable injury as a result of an order directing that the body's composition be changed. The present case, however, is distinguishable in important respects. As we explain above, the decision whether to use sampling in conducting the 2000 census can have no effect on the number of Representatives that will sit in the 107th or any subsequent Congress. The House, moreover, has not initiated this litigation to defend the manner in which it is currently constituted. Rather, the House claims that it will suffer a judicially cognizable injury if the Commerce Department's conduct of the 2000 census causes it to be unlawfully constituted in the future. Finally, the instant case was filed by a *federal* legislative entity, whose capacity to sue in order to vindicate the general public and governmental interest in enforcement of applicable law is subject to constitutional separation-of-powers limitations that do not apply to state entities like the appellant in *Beens*.

of this section as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141(b)(emphasis added). In addition, 2 U.S.C. 2a(a) requires the President to "transmit to the Congress a statement showing the whole number of persons in each State, \* \* \* as ascertained under the \* \* \* decennial census of the population, and the number of Representatives to which each State would be entitled" (emphasis added). Taken together, the relevant statutory provisions manifest a clear congressional intent that the Secretary be permitted to employ "sampling procedures and special surveys" in conducting the "decennial census of population," which census will be used to determine the state-level population figures that are employed in the apportionment process.

The district court concluded (App., *infra*, 50a-59a) that the Commerce Department's plan for the 2000 census was barred by 13 U.S.C. 195, which states that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title" (emphasis added). The court's reliance on that provision was misplaced. The underscored language makes clear that Section 195's generally applicable mandatory directive to the Secretary—*i.e.*, that statistical sampling "shall" be used if its use is considered "feasible"—does not apply to the apportionment process. That language does not, however, speak to the question whether the Secretary *may* employ sampling for apportionment purposes if he deems that course to be appropriate. That question is (as we explain above) directly addressed by Section 141(a),



which states that the Secretary is authorized to use "sampling procedures and special surveys" in conducting the "decennial census of population."<sup>7</sup>

3. The House of Representatives also contended in the district court that the Secretary's plan for the 2000 census violates the constitutional requirement that Representatives be apportioned among the States on the basis of an "actual Enumeration," Art. I, § 2, Cl. 3—a requirement that the House construes as mandating a "headcount" (House Sum. Judg. Mem. 47, 51) of individuals "reckoned singly" (*id.* at 55). Although the district court declined to address that claim in light of its ruling on the statutory question (see App., *infra*, 64a), this Court may wish to resolve the constitutional issue if it concludes that the suit satisfies the requirements of Article III and that the Secretary's plan for the 2000 census is consistent with the Census Act.

The constitutional requirement that Congress provide for an "actual Enumeration" of the population does not foreclose the use of statistical sampling mechanisms that the Commerce Department has concluded will enable it more accurately to determine the "respective Numbers" of "the several States." Since at least 1577, the word "enumeration" has been understood to mean

<sup>7</sup> Indeed, the district court's reading of Section 195 renders Section 141(a)'s reference to "sampling procedures" altogether superfluous. In the district court's view, Section 195 prohibits the use of sampling in determining the population figures to be used in apportionment, and requires its use (where feasible) in all other programs where the Secretary acts pursuant to Title 13. So construed, Section 195 deals comprehensively with the use of sampling in all Title 13 activities. If that is what Section 195 means, then Section 141(a)'s express authorization of the use of "sampling procedures" in connection with the "decennial census of population" is without practical significance.

"[t]he action of ascertaining the number of something; esp. the taking [of] a census of population; a census." 3 *The Oxford English Dictionary* 227 (1933). The Secretary's plan for the 2000 census indisputably constitutes a means "of ascertaining the number of" persons within each State. The Census Clause does not require that the relevant numbers be determined through any particular methodology.<sup>8</sup> To the contrary, it vests

<sup>8</sup> Article I, Section 9, Clause 4 of the Constitution provides that "[n]o capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." The phrase "Census or Enumeration herein before directed to be taken" can only be understood to refer to the "actual Enumeration" mandated by Article I, Section 2, Clause 3. Article I, Section 9, Clause 4's reference to a "Census or Enumeration" strongly indicates that the Framers understood the word "enumeration" to be synonymous with "census"—i.e., the requirement that an "Enumeration" be conducted does not dictate the use of any particular methodology in determining the total population of each State.

The fact that the Census Clause refers to an "actual" enumeration does not suggest that the determination of state-level population figures—the only constitutionally mandatory use of the census—must be based exclusively on a "headcount" (see p. 18, *supra*) of identified individuals. Rather, the word "actual" was used to distinguish the permanent basis for apportioning the House from the temporary allocation of Representatives set forth in the Census Clause. See Art. I, § 2, Cl. 3 (stating that until the first "enumeration" has been conducted, "the State of New Hampshire shall be entitled to chuse three [Representatives], Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three"). Read in the context of the Census Clause as a whole, the reference to an "actual Enumeration" means only that the apportionment of Representatives must be based on a systematic effort to determine the actual number of persons within each State.

Congress with extremely broad discretion, providing that the census shall be conducted "in such Manner as [Congress] shall by Law direct." Art. I, § 2, Cl. 3. See *City of New York*, 517 U.S. at 19 ("The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and "there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides").

### CONCLUSION

The Court should note probable jurisdiction.  
Respectfully submitted.

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SEPTEMBER 1998

### APPENDIX A

#### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 98-0456  
Three Judge Court  
(RCL, DGH, RMU)

UNITED STATES HOUSE OF REPRESENTATIVES,  
PLAINTIFF

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

and

RICHARD A. GEPHARDT, ET AL.;  
LEGISLATURE OF THE STATE OF CALIFORNIA, ET AL.;  
CITY OF LOS ANGELES, ET AL.;  
NATIONAL KOREAN AMERICAN SERVICE &  
EDUCATION CONSORTIUM, INC., ET AL.  
INTERVENOR-DEFENDANTS

[Filed: Aug. 24, 1998]

### MEMORANDUM OPINION

Plaintiff, the United States House of Representatives, seeks summary judgment against the Department of Commerce and the Bureau of the Census ("defendants") in this action challenging defendants' plan for the 2000 census. Plaintiff claims that using



statistical sampling to supplement the headcount enumeration used to apportion representatives among the states violates the Census Act, 13 U.S.C. § 1 *et seq.*, and Article I, section 2, clause 3 of the Constitution. The House seeks a declaration that statistical sampling is unlawful and/or unconstitutional and an injunction preventing defendants from using statistical sampling in the 2000 census.

Now before the court are defendants' and intervenor-defendants'<sup>1</sup> motions to dismiss plaintiff's complaint pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, and plaintiff's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons stated below, the motions to dismiss will be denied and plaintiff's motion for summary judgment will be granted.

#### I. BACKGROUND

The Constitution requires Congress to conduct an "actual Enumeration" of the population every ten years "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3; *see Wisconsin v. City of New York*, 517 U.S. 1, 5 (1996). Congress has delegated broad authority over the conduct of the census to the Secretary of Commerce through the Census Act. *See* 13 U.S.C. § 1 *et seq.*; *see also Wisconsin*, 517 U.S. at 19. The Census Act governs the Census Bureau's (the

<sup>1</sup> On May 27, 1998, pursuant to Fed. R. Civ. P. 24(b), the court granted the motions of four groups of movants to intervene as defendants: the Richard A. Gephardt Group, the California Legislative Group, the City of Los Angeles Group and the National Korean American Service and Educational Consortium Group. For purposes of clarity, the original defendants and the four intervenor-defendants collectively will be referred to as "defendants" except where their interests or arguments diverge.

"Bureau") gathering of economic, social and demographic data about the United States, including the decennial apportionment census mandated by the Constitution.

Despite the constitutional mandate to obtain an "actual enumeration" of the population, "no census is recognized as having been wholly successful in achieving that goal." *Wisconsin*, 517 U.S. at 6 (citing *Karcher v. Daggett*, 462 U.S. 725, 732 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973)). The 1990 census was no exception. According to the Bureau, "[t]hough better designed and executed than any previous census, the Census in 1990 took a step backward on the fundamental issue of accuracy. For the first time since the Census Bureau began conducting post-census evaluations in 1940, the decennial census was *less* accurate than its predecessor. . . . the undercount rate of 1.8 percent in 1990 was 50 percent greater than the rate had been in 1980." United States Department of Commerce, Bureau of the Census, Report to the Congress—The Plan for Census 2000, at 2 (revised August 1997) ("Census 2000 Report"). Specifically, the Bureau reports that children, renters (particularly in rural areas), and racial and ethnic minorities were significantly undercounted. Among those the 1990 census missed were 4.4% of African-Americans, 5.0% of Hispanics, and 12.2% of American Indians living on reservations, but only 0.7% of Non-Hispanic Whites. *See* Census 2000 Report at 3-4.<sup>2</sup> This undercounting of certain groups

<sup>2</sup> That the undercount problem is not evenly distributed, and that minorities are thought to be undercounted to a greater degree than the population as a whole, are among the most troubling aspects of the census in the late 20<sup>th</sup> century. The Supreme Court and other reviewing courts have observed the persistence of the

relative to others, known as the "differential undercount," raises the possibility of congressional malapportionment, as jurisdictions with large numbers of undercounted persons may have a greater share of the total population than the census figures suggest.

Concerned about problems with the 1990 census, Congress passed the Decennial Census Improvement Act of 1991, P. L. 102-135, 105 Stat. 635 (1991), which directed the National Academy of Sciences to study "the means by which the Government could achieve the most accurate population count possible," including consideration of "the appropriateness of using sampling methods in combination with basic data-collection techniques." *Id.* (quoted in Census 2000 Report at 6). The National Academy established three panels to develop a means to achieve greater accuracy for the 2000 census. All three panels concluded that traditional census methods needed to be modified in response to societal changes, and that statistical sampling techniques would both increase the census' accuracy and lower its cost. See Census 2000 Report at 7-8 (quoting the conclusion

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differential undercount problem even as the overall census count has become more accurate. See *Wisconsin*, 517 U.S. at 7; *City of Detroit v. Franklin*, 4 F.3d 1367, 1371 (6th Cir. 1993) (noting that in the 1990 enumeration blacks and other minorities were undercounted to a greater degree than non-Hispanic whites); *Tucker v. Department of Commerce*, 958 F.2d 1411, 1412-13 (7th Cir. 1992) ("There is reason to believe . . . that the undercount is not randomly distributed, but instead is concentrated in the poor, among whom blacks and Hispanics are disproportionately represented, and among illegal aliens, who are disproportionately Hispanic"); see also Christopher Taylor, Note, *Vote Dilution and the Census Undercount: A State-by-State Solution*, 94 Mich. L. Rev. 1098, 1102 (1996) (documenting the increase in the African-American undercount since 1940).

(quoting the conclusion of the Academy Panel on Methods that "[d]ifferential undercount cannot be reduced to acceptable levels at acceptable costs without the use of integrated coverage measurement and the statistical methods associated with it").

Based upon the results of these congressionally-authorized National Academy studies, combined with ninety years of census-taking experience, meetings with the public in thirty cities, congressional input, and advice from no fewer than six advisory committees, see Census 2000 Report at 9-10, the Bureau developed its master plan for the 2000 enumeration. At issue is the Bureau's plan to use statistical sampling to supplement data obtained through traditional census methods.<sup>3</sup>

Statistical sampling is best understood as using information derived from a portion of a population to infer information on the population as a whole. The Bureau intends to use sampling in three different phases of the 2000 census. First, the Bureau will use sampling in the Postal Vacancy Check program to verify the United States Postal Service's determination

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<sup>3</sup> Innovations in the 2000 census are not limited to statistical sampling. The Bureau also has developed a number of techniques to improve returns in the traditional headcount phase. First, the Master Address File (MAF) of the estimated 118 million housing units in the nation will be far superior to the one generated in 1990. See Census 2000 Report at 19-21 (detailing the methods that will be used to compile a more accurate MAF). Second, the Bureau plans to improve overall outreach by mailing two waves of census questionnaires (with each wave preceded by a mailed notice/reminder), creating more ways to respond, and employing questionnaires written in other languages. *Id.* at 21-22. Finally, the Bureau plans to introduce several new technologies to eliminate multiple responses from the same household, and to use new hardware and software for better data capture. *Id.* at 22.



that certain housing units are vacant and to correct for anticipated errors in this designation. Second, the Bureau will use sampling techniques in the Nonresponse Follow-Up ("NRFU") phase of the census. Finally, the Bureau intends to conduct a post-census survey, an operation referred to as Integrated Coverage Measurement ("ICM"). The Postal Vacancy Check sampling plan is not at issue in this litigation. The court will describe the latter two processes briefly.

1. *Nonresponse Follow-Up*: If all households returned their census forms by mail, NRFU would be unnecessary. However, in 1990 only 65% of households returned their forms, down from 78% in 1970. The Bureau does not expect a substantially higher rate of return in 2000, estimating that even with its innovations, the response rate will be around 67%, or approximately 34 million non-responding households. See Census 2000 Report at 26.

During the 1990 census, Bureau enumerators personally visited all non-responding housing units, with some homes receiving as many as six repeat visits before the Bureau ultimately relied upon proxy data (from neighbors) or imputation data (computer-inferred) to determine the number of persons residing in each non-responding household. The Bureau considers the non-response follow-up to be the "most difficult logistical segment" of the census. Census 2000 Report at 27.

Under the planned NRFU program, enumerators will not endeavor to personally contact all non-responsive households. Rather, they will visit a randomly selected sample of non-responding housing units. The sample is random to ensure that the units chosen "will be statistically representative of all housing units in a non-responding tract." Census 2000 Report at 27-28

(defining a "tract" as having homogeneous population characteristics, such as economic status and living conditions). The percentage of housing units visited will vary with the mail response rate to ensure that enumerators directly contact 90% of the units in each tract. For example, in census tracts in which only 30% of households respond, 6 of 7 addresses will be visited by enumerators, but in tracts with an 80% return rate, only 1 of 2 will be contacted. As to the households in each tract not personally visited, the Bureau will estimate the number of persons residing within those units based upon data collected from the households that received a follow-up visit. The Bureau states that with this sampling technique, enumerators will only have to visit 22.5 million housing units, as opposed to the 34 million they would have to visit without relying upon sampling. See Census 2000 Report at 27.

2. *Integrated Coverage Measurement*: The second phase of the 2000 census challenged by the House is the ICM, a post-census survey which utilizes "Dual System Estimation" ("DSE") or "capture/recapture" to compensate for any undercount or differential undercount after the initial enumeration is complete. See Census 2000 Report at 29-32; see also *Wisconsin*, 517 U.S. at 8-9 (explaining how DSE would operate in counting the number of pumpkins in a large pumpkin patch). To conduct the ICM, the Bureau will classify each of the country's 7 million city blocks into categories the Bureau refers to as "strata." These strata will be based on characteristics of the block determined in the 1990 census such as the block's state, racial and ethnic composition, and proportion of renters to homeowners.<sup>4</sup>

<sup>4</sup> An example of a "homogeneous sampling stratum" would be "blocks in large central cities with a 1990 census population that



The Bureau will then select blocks at random from each stratum for a total of 25,000 blocks. Based on an average of 30 housing units per block, it will obtain information from approximately 750,000 housing units. That number will establish a representative sample large enough, the Bureau claims, to estimate population totals for each state.

ICM interviewers will interview the residents of the 750,000 housing units in the sample blocks, thereby establishing a roster of Census Day residents independent of the initial enumeration roster. If data collected for a household during the ICM interview differs from data obtained during the original headcount phase, a follow-up ICM interviewer will return to the address to rectify the discrepancy and find the "true" situation. Each person then will be assigned to a unique "poststratum," which is a group of persons who have a similar probability of being counted in the initial data collection operation. The poststrata are defined by state geographic subdivision (such as rural or urban), owner or renter, age, sex, race and ethnic origin.

Upon completion of this process, using the statistical methodology of DSE, the Bureau will derive population data by comparing the results of the original headcount for the sample blocks with the ICM results for those same blocks. The Bureau will then determine the error rate in the nationwide headcount for each poststratum. The error rates will be applied to the original headcount results to ascertain the number of housing units and total population in each poststratum. These totals will

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was 30 percent or more African American renters and with 10 percent or more Hispanic renters." Census 2000 Report at 30.

then be summed to obtain the total population for each state.

Another central feature of the Bureau's plan is that it will conduct a "one-number census." See United States Department of Commerce, Bureau of the Census, Census 2000 Operational Plan at I-1, 5, IX-18, 20, 23 (April 1998) ("Census 2000 Operational Plan"); see also 33 Weekly Comp. Pres. Doc. 1927 (Nov. 26, 1997). The Bureau does not intend to conduct two parallel enumeration efforts employing different methodologies. The only number that would be ascertained by the Bureau is a number derived through statistical sampling. The "raw data" would be unusable for apportionment. See 33 Weekly Comp. Pres. Doc. 1927 (Nov. 26, 1997).

Upon announcement of the Department of Commerce's plan to utilize statistical sampling in the 2000 enumeration effort, Congress attempted to amend 13 U.S.C. § 141(a) to provide that, "[n]otwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in [C]ongress among the several States." Supplemental Appropriations and Rescissions Act, H.R. 1469, 105th Cong., 1st Sess. (1997). President Clinton vetoed this bill, in part due to its prohibition on the use of sampling in the 2000 decennial enumeration. See 33 Weekly Comp. Pres. Doc. 846-48 (June 19, 1997).

Following this veto, Congress enacted, and the President signed into law, a statute requiring the Department of Commerce to provide a comprehensive written report explaining the design for the 2000 census and detailing any planned use of statistical sampling techniques. See Pub. L. No. 105-18, 111 Stat. 158, 217

(1997). Pursuant to that legislation, the Commerce Department issued the Census 2000 Report.

After receipt of the Census 2000 Report, Congress passed, and the President signed into law, the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2480-87 (1997) ("1998 Appropriations Act"). Section 209(c)(2) of this Act provides that the Census 2000 Report and the Census 2000 Operation Plan "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding." Section 209(b) authorizes "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any other provision of law (other than this Act), in connection with the 2000 or later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress," to bring a civil action to obtain declaratory, injunctive, and any other appropriate relief. Section 209(d) defines an "aggrieved person" to include, *inter alia*, "either House of Congress."

The United States House of Representatives filed this suit on February 20, 1998, as a person directly affected and aggrieved by the Bureau's decision to use statistical sampling in the 2000 census. The House seeks a declaration that the use of sampling to determine the population for purposes of apportioning members of the House of Representatives among the several states violates the Census Act and the Constitution. The House also seeks a permanent injunction preventing defendants from using sampling for Nonre-

sponse Follow-Up, for Integrated Coverage Measurement, or in any other way, in the apportionment aspect of the 2000 census.

## II. MOTIONS TO DISMISS

Defendants' motions to dismiss<sup>5</sup> offer several grounds for dismissal: (1) that the United States House of Representatives lacks Article III standing because it has not established that it will suffer a legally cognizable injury; (2) that the House's challenge is not ripe for adjudication; (3) that the court should decline to hear this case because it constitutes a dispute between the two political branches of government; and, (4) that permitting the House of Representatives to bring this action violates the doctrine of separation of powers. Each of these arguments will be considered in turn.

### A. Article III Standing: Legally Cognizable Injury

On a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). In the context of a challenge to the plaintiff's standing to sue, this means that the plaintiff's arguments on the merits are accepted as valid. See *Moore v. United States House of Representatives*, 733 F.2d 946, 950 (D.C. Cir. 1984); *American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982) ("For purposes of the standing

<sup>5</sup> At oral argument, intervenor-defendant National Korean American Service & Education Consortium, Inc., *et al.* moved to join the Department of Commerce's motion to dismiss, and the court granted that motion.



issue, we accept as valid Congressman Sabo's pleaded legal theory"); *Goldwater v. Carter*, 617 F.2d 697, 701-02 (D.C. Cir.) (en banc) (same; noting plaintiffs' theory that the Senate has a constitutional right to vote on a proposed treaty termination), *vacated on other grounds*, 444 U.S. 996 (1979); see also *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (noting that the standing inquiry "in no way depends upon the merits"). Here, plaintiff's substantive argument is that either the Census Act or the Constitution forbids the use of statistical sampling to determine population for purposes of apportioning congressional representatives among the states.

Under Article III, section 2 of the Constitution, federal courts only have jurisdiction to hear and decide "cases" or "controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). One aspect of this limitation is that a plaintiff must establish that he has standing to sue. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit, although that inquiry 'often turns on the nature and source of the claim asserted.'" *Raines v. Byrd*, 117 S. Ct. 2312, 2317 (1997) (quoting *Warth*, 422 U.S. at 500) (internal citation omitted). The Supreme Court has always demanded strict compliance with the standing requirement, see *Allen*, 468 U.S. at 752, and "our standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 117 S. Ct. at 2317-18 (citations omitted).

Article III standing<sup>6</sup> consists of three elements. First, a plaintiff must "have suffered an 'injury in fact'—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Bennett v. Spear*, 117 S. Ct. 1154, 1163 (1997) (citing *Lujan*, 504 U.S. at 560-61 (footnotes, citations and internal quotations omitted)). The imminence requirement "ensure[s] that the alleged injury is not too speculative for Article III purposes—that the injury is 'certainly impending.'" See *Lujan*, 504 U.S. at 564 n.2 (quoting *Whitmore*, 495 U.S. at 158). Second, there must be a causal connection between the injury alleged and the conduct complained of; the injury must be fairly traceable to the defendants' acts and not the result of conduct by a third party not before the court. Finally, it must be likely, as opposed to speculative, that the injury will be redressable through a court's favorable disposition of the matter. See *Bennett*, 117 S. Ct. at 1163; *Lujan*, 504 U.S. at 560-61. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990); *Warth*, 422 U.S. at 508). As the parties do not dispute, and the court has no doubt, that

<sup>6</sup> Any prudential limitations on standing have been eliminated in this case by section 209(b) of the 1998 Appropriations Act. See *Federal Election Comm'n v. Akins*, 118 S. Ct. 1777, 1783-84 (1998); *Raines*, 117 S. Ct. at 2318 n.3 ("Congress' decision to grant a particular plaintiff the right to challenge an act's constitutionality . . . eliminates any prudential standing limitations."); *Warth*, 422 U.S. at 501 ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

the causation and redressability elements are satisfied,<sup>7</sup> the court limits the standing discussion to whether plaintiff suffers an injury in fact sufficient to satisfy Article III.<sup>8</sup>

Defendants note that no matter how the 2000 census is conducted, the subsequent House of Representatives will be composed of 435 members. They therefore claim that any "injury" to the House due to the methodology used or results derived therefrom, such as a change in the distribution of seats among the states, would not be an injury separate and distinct from that suffered by the general public. The asserted harm would be "shared in substantially equal measure by all or a large

<sup>7</sup> In their reply memorandum in support of their motion to dismiss, defendants for the first time claim that redressability is at issue to the extent that the House relies upon 2 U.S.C. § 2a(a) as a source of injury, because it is the President, not the Secretary or the Bureau, who ultimately transmits the apportionment statement to Congress. See *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). This argument lacks merit. Section 2a(a) directs the President to transmit to Congress the number of persons "as ascertained under the decennial census of the population," meaning that the President must use the census figures as the basis for the numbers he forwards. See *id.* at 797 (noting that the president must use "data from the 'decennial census'"). An injunction issued against the Secretary or the Bureau prohibiting the use of statistical sampling in the apportionment census would grant plaintiff the relief it seeks.

<sup>8</sup> Because Article III standing is subject to an "imminence" threshold, and ripeness requires a finding of "direct and immediate harm," these two justiciability doctrines often merge. See *Warth*, 422 U.S. at 499 n.10 (noting the "close affinity" between ripeness and standing). For purposes of clarity, this section on standing will be limited to determining whether plaintiff has alleged a legally cognizable injury. Section II.B will then turn to the question of whether the alleged injury is sufficiently immediate and "certainly impending."

class of citizens." *Warth*, 422 U.S. at 499. "Whether styled as a constitutional or prudential limit on standing, the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." *Akins*, 118 S. Ct. at 1785 (citations omitted); but see *id.* at 1786 ("where a harm is concrete, though widely shared, the Court has found 'injury in fact.'") (citation omitted). In other words, even conceding that statistical sampling would cause a legally cognizable injury, defendants posit that such a "generalized grievance" cannot confer standing, citing *Allen*, 468 U.S. at 755-56, and *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982) (noting that the court should refrain from adjudicating questions of wide public significance that amount to generalized grievances).

The House of Representatives offers four "concrete and particularized" injuries that it will suffer if the 2000 census employs statistical sampling to supplement the initial headcount enumeration. First, the House asserts a right to timely receive from the President census information that complies with the Census Act and Constitution. See 2 U.S.C. § 2a(a). The House alleges that if the Bureau employs statistical sampling in tabulating the population for apportionment, it will be deprived of its receipt of a statement of "the whole number of persons in each state . . . as ascertained under the . . . decennial census of the population," thereby suffering an "informational injury" *Id.* Second, the House contends that it has a concrete and particularized interest in its composition, and that if



statistical sampling is utilized, subsequent Houses elected under that apportionment will necessarily have an unlawful and/or unconstitutional composition. Third, the House states that it has a particularized interest in the use of a census procedure that minimizes the opportunity for political manipulation, thereby preserving the House's institutional integrity. Finally, the House contends that it has a mandatory constitutional duty to ensure that an actual enumeration is taken every ten years, and that the House membership is apportioned in accordance with that enumeration. Because the court finds that plaintiff has properly alleged a judicially cognizable injury through its right to receive information by statute and through the institutional interest in its lawful composition, it need not consider the third and fourth claims.

#### 1. The Informational Injury Is Legally Cognizable

Plaintiff alleges that the Bureau's decision to use statistical sampling will deprive Congress of information which it is entitled to receive under 2 U.S.C. § 2a(a). That provision states, in relevant part, "the President shall transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population." The essence of the injury claim is that statistical sampling will deprive Congress of information it is entitled to by statute (and the Constitution), and must have in order to perform its mandatory constitutional duty—the apportionment of Representatives among the states.

The inability to receive information which a person is entitled to by law is sufficiently concrete and particular to satisfy constitutional standing requirements. In *Federal Election Comm'n v. Akins*, 118 S. Ct. 1777

(1998), plaintiffs claimed as their "injury in fact" their failure to receive donor lists and campaign contribution and expenditure information that various subsections of 2 U.S.C. § 431 required the American Israel Public Affairs Committee to make public. *See id.* at 1782-83. In holding that this injury satisfied Article III, the Court noted that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to receive information which must be publicly disclosed pursuant to a statute." *Id.* at 1784-85 (citing *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982)). The court noted that the information would help respondents evaluate candidates for public office and determine the role that financial assistance might play in a specific election. "Respondents' injury consequently seems concrete and particular." *Akins*, 118 S. Ct. at 1784.

The "informational injury" supporting Article III standing in *Akins* will be suffered by the House of Representatives. If statistical sampling in the apportionment census violates the Census Act or the Constitution, Congress will not receive information that it is entitled to by statute. And, while *Akins* indicated that the information desired by a plaintiff need only "help" him accomplish desired goals, the information sought by the House here is necessary to perform a constitutionally mandated function, making its injury claim far more compelling.

In *Akins*, the Court addressed a situation in which information to which the complaining party was statutorily entitled was never disclosed. In the instant matter, the House does not claim that it will not receive any census statement from the President, but rather that it will receive an *incorrect* statement because the decen-

nial census will have been unlawfully or unconstitutionally conducted. However, here, receipt of the wrong information is no less of an injury than failure to receive any information at all. In either instance, Congress would not be provided with information it was entitled to receive by law, and would be equally unable to perform properly the single mandatory constitutional function dependent upon receipt of that information. For example, if the Secretary decided, in the exercise of his broad discretion, to count only persons over the age of 18, there is little question that Congress would receive the "wrong" numbers from the President, and the resulting apportionment would be constitutionally infirm because it would not be based upon an "actual enumeration." The House claims that, no different than excluding minors, using statistical sampling necessarily provides it with the wrong information. In this instance, receipt of the wrong "statement showing the whole number of persons" constitutes an "informational injury" sufficiently concrete so as to satisfy the irreducible constitutional minimum of Article III.

Before the Supreme Court's *Akins* decision and the cases supporting that holding, it was well established that a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities. This right to receive information arises primarily in subpoena enforcement cases, where a house of Congress or a congressional committee seeks to compel information in aid of its legislative function. In *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927), the Supreme Court affirmed the Senate's right to enforce its power of inquiry by subpoenaing witnesses for information pertinent to legislative concerns. In so holding, the Court noted,

"[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." The ability of the Senate to seek redress in court demonstrates that the deprivation of pertinent legislative information constitutes an Article III injury. Similarly, in *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), the House sought information "necessary for the formulation of new legislation," and the Executive Branch asserted its authority to maintain control over the information. *Id.* at 385. The court held that "[i]t is clear that *the House as a whole has standing* to assert its investigatory power," thereby holding that a failure to receive sought-after information constitutes an Article III injury to the legislative body. *Id.* at 391 (emphasis added). See also *In re Application of United States Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232 (D.C. Cir. 1981) (permitting a Senate subcommittee to come to federal court to obtain an order enforcing a subpoena for testimony on mob violence and organized crime); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 727 (D.C. Cir. 1974) (seeking a judicial declaration as to whether the President must comply with a subpoena duces tecum).

The existence of a legally cognizable injury arising from a legislature's inability to obtain information is not limited to the legislative function. In *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613, 616 (1929), the Court extended *McGrain* to a case in which the Senate sought information in conjunction with its power to judge the elections, returns and qualifications of its members under Article I, section 5, clause 1 of the Constitution. "[B]ut the principle is equally, if not a



*fortiori*, applicable where the Senate is exercising a judicial function." *Id.* at 616. Because a legislative body suffers injury when it cannot obtain information necessary to perform its constitutional legislative or judicial functions, this court sees no principled basis on which to conclude that the House is not similarly (if not *a fortiori*) injured when it cannot obtain information necessary to perform its constitutional apportionment function.

The court concludes that the House has Article III standing because it alleges that the use of statistical sampling will cause it to fail to receive census information to which it is entitled as a matter of law. This injury is indisputably concrete and particularized, as it affects the House "in a personal and individual way." *See Akins*, 118 S. Ct. at 1791 (Scalia, J., dissenting) (quoting *Lujan*, 504 U.S. at 560 n.1).

## 2. The House Has A Concrete and Particularized Interest in its Lawful Composition

The House alleges that the failure to conduct the apportionment census in a manner consistent with the requirements of the Census Act and Constitution would necessarily result in the unlawful composition of any House elected and seated pursuant to the resulting apportionment. It claims that its institutional interest in preventing its unlawful composition is a sufficient injury in fact for Article III. *See Powell v. McCormack*, 395 U.S. 486, 548 (1969) ("Unquestionably, Congress has an interest in preserving its institutional integrity.").

That a legislative body has a personalized and concrete interest in its composition is far from a novel concept. In *Sixty-Seventh Minnesota State Senate v.*

*Beens*, 406 U.S. 187 (1972), three qualified voters challenged the constitutionality of Minnesota's 1966 Act apportioning the legislature, and the State Senate intervened as a party defendant under Fed. R. Civ. P. 24(a). The district court declared the 1966 Act unconstitutional and entered orders reapportioning the legislature, reducing the number of senate seats. The State Senate appealed the orders; among the grounds appellees asserted in support of their motion to dismiss was that the Senate lacked standing to prosecute the appeal. *See id.* at 193. In holding that the Senate had standing, the Court stated, "certainly the Senate is directly affected by the District Court's orders [concerning apportionment]." *Id.* at 194. This "direct effect," dispositive in *Beens*, is also present in the instant matter, because whether or not statistical sampling is utilized by the Bureau may potentially affect the composition of the House.

As defendants accurately note, in *Beens* the district court's orders affected the number of seats in the Minnesota Senate. In the instant matter, the number of seats allocated to the House of Representatives will remain at 435 no matter how the census is conducted. However, the Court's reliance on *Silver v. Jordan*, 241 F. Supp. 576, 579 (S.D. Cal. 1964), *aff'd*, 381 U.S. 415 (1965) in reaching its *Beens* conclusion demonstrates that a legislature's claim of an institutional interest in its composition is not limited to instances in which the size of the legislature would necessarily change. In *Silver*, the method of apportionment—population v. geographic—was the subject of the litigation. The court concluded that the State Senate had standing to intervene because it would be "directly affected by the decree" of the district court. *Id.* at 579.

On the basis of *Beens*, and the Supreme Court's citation to *Silver*, it is apparent that a legislative body has a judicially cognizable interest in matters affecting its composition so as to satisfy Article III, whether or not the challenged conduct will ultimately have an effect on the size of the body.<sup>9</sup>

### 3. The Current House of Representatives May Prosecute This Suit

Defendants allege that even if statistical sampling inflicts a concrete and particularized injury sufficient to satisfy Article III standing requirements, the injuries will not be felt by *this* plaintiff. Defendants contend that it is not the present House of Representatives that will suffer the informational injury. Rather, the effects of sampling will be felt by the 107<sup>th</sup> House, because it is the 107<sup>th</sup> House that will be seated at the time that the President transmits the apportionment statement to Congress. See Defendants' Reply Memorandum in Support of Its Motion to Dismiss at 18-19. Similarly, the present House will not suffer any compositional injury, because the 108<sup>th</sup> House will be the first House elected and seated based upon the 2000 apportionment. Therefore, the 105<sup>th</sup> House, the House that filed the complaint, does not have Article III standing.

<sup>9</sup> The concept that the House of Representatives (and the Senate) has a concrete and particularized interest in matters affecting its composition has constitutional inklings as well. Article I, section 5, clause 1 of the Constitution states that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members." While that clause does not go directly to the conduct of the census or apportionment, it provides some indication that the framers believed that each chamber has an individualized interest in its own composition.

Defendants have marshaled authority for the concept that the House of Representatives is not a continuing body. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 512 (1975); *Gojack v. United States*, 384 U.S. 702, 706 n.4 (1966) (noting that "[n]either the House of Representatives nor its committees are continuing bodies"); *McGrain*, 273 U.S. at 181 (distinguishing the Senate, which is a "continuing body," from the House). Furthermore, at oral argument, defendants noted that when the House used to jail a person for contempt of Congress, the contemnor was released at the end of the session because no continuing authority existed to hold the person. See *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 230 (1821) ("[A]nd although the legislative power continues perpetual, the legislative body ceases to exist, on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.").

Although the House reconstitutes every two years, as an institution it is, in some respects, a continuing entity. Chapter 4 of Title 2 of the United States Code describes extensive procedures governing the House of Representatives (and the Senate). Its provisions indicate that certain functions transcend the seating of a new House, such as the ownership of property. See, e.g., 2 U.S.C. § 112e(b).

However, whether or not the House of Representatives is a continuing body for purposes of prosecuting or defending suits is a matter that need not be definitively resolved here. The court finds that the 105<sup>th</sup> House of Representatives is a proper plaintiff. Even assuming that only the 107<sup>th</sup> and later Congresses will suffer the claimed injuries, these Congresses do not presently exist. Nor will they exist until *after* the 2000 census has



been conducted. If judicial review must be deferred until after the 107th House is seated, the possibility of irreparable harm—both monetary and non-monetary—is likely, if not certain. Should the courts invalidate the census in 2001 or anytime thereafter, the “one-number census” method would require the entire enumeration to be re-conducted at a cost of \$4 billion, and, more importantly, the new census would not be completed before the date Congress is supposed to perform its constitutional duty regarding apportionment.

In sum, the injuries are now imminent. Like the impact of a wave that has not yet reached the shore, the injuries, although yet to be felt, are inexorable if they are not prevented now. For this reason we conclude that the 105th House is a proper plaintiff. The 107th House—the first House that will suffer from the injury—is not yet in place and cannot bring suit in its own right; but the court does not conclude therefrom that no one has standing to sue. While there are some injuries for which no one may bring suit, *see United States v. Richardson*, 418 U.S. 166, 179 (1974) (noting that “the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process”), the court has already held that the injuries claimed by the House are cognizable and that the 107th House could, if it were already in existence, bring this suit. The present incapacity of the 107th Congress should be viewed not as an insurmountable barrier but as a reason to allow the present House to bring suit on behalf of its successor.

There are three prudential requirements for third party standing: the plaintiff must have a “close relation-

ship” with the real party in interest, the litigation must have “an impact [upon] the rights” of that third party, and there must be “a barrier” keeping that party from asserting its rights. *Hutchins by Owens v. District of Columbia*, 144 F.3d 798, 803 (D.C. Cir. 1998); *see Barrows v. Jackson*, 346 U.S. 249, 257-59 (1953). The current situation meets all three requirements. The 105th House has a close relationship to its successor, the 107th; the litigation will affect the interests of the 107th House; and the 107th House cannot bring suit itself in time to avert the claimed injury.

Ordinarily a plaintiff asserting the rights of another must itself have suffered an Article III injury. *See Hutchins*, 144 F.3d at 803. Here, as the court has just explained, the 107th House will certainly suffer an injury. In the peculiar circumstances of this case, however, we need not decide whether the current House also suffers a present injury. In the court’s view, the 105th House need not itself suffer an injury in order to vindicate the rights of its successor House. In so holding we draw upon cases granting standing both to “next friends” and to fiduciaries without requiring that they have themselves suffered an Article III injury.

A “next friend” must provide “an adequate explanation . . . why the real party in interest *cannot* appear on his own behalf,” and must be “truly dedicated to the best interests of the person on whose behalf he seeks to litigate.” *Whitmore*, 495 U.S. at 163 (emphasis added). If the plaintiff meets these high standards, however, he may litigate on behalf of a third party without himself having an Article III injury. Similarly, because a fiduciary must dedicate himself to the best interests of his beneficiary, and has the legal obligation to vindicate the beneficiary’s interests, by litigation if necessary, courts

have granted standing to fiduciaries who do not themselves suffer an Article III injury. See, e.g., *Irving Bank Corp. v. Board of Governors of the Fed. Reserve Sys.*, 845 F.2d 1035, 1039 (D.C. Cir. 1988).

Without holding that the 105<sup>th</sup> House is itself either the “next friend” of or a fiduciary for the 107<sup>th</sup> House, we hold that because of the special relationship between the present House and its successor once removed, the 105<sup>th</sup> House has standing to litigate on behalf of the 107<sup>th</sup> House. This permits the current House to vindicate the later House’s interest in fulfilling its constitutional duties regarding the census, without giving rise to general legislative standing, as explained in the next section.

4. The Finding of an Injury in This Matter Neither Conflicts with *Raines v. Byrd* Nor Gives Rise to a Doctrine of General Legislative Standing.

The House of Representatives alleges an injury based upon claims that it will not receive information to which it is entitled by law and which it needs to perform a mandatory constitutional function, and that an improperly conducted census will cause it to become unlawfully composed. Therefore, holding that the House has standing is not at odds with *Raines v. Byrd*. Nor does it give rise to generalized legislative standing, by which the House or Senate could file suit whenever either alleged that the Executive Branch was acting in a manner contrary to the law or the Constitution.

In *Raines*, the Supreme Court rejected appellees’ claim of legislative standing. The Court concluded that a claim of diminution of legislative power did not support Article III standing because the congressional plaintiffs did not have a sufficient “personal stake” in

the dispute and the injury was not sufficiently concrete. See *Raines*, 117 S. Ct. at 2322. However, in reaching this conclusion, the Court expressly distinguished *Powell v. McCormack*, 395 U.S. 486 (1969), and *Coleman v. Miller*, 307 U.S. 433 (1939), thereby indicating that legislative standing survives in cases in which the injury to a legislator (or legislative entity) is personal, or where the institutional injury alleged is not “wholly abstract and widely dispersed.” *Raines*, 117 S. Ct. at 2322. This case falls within the narrow area left by the Court. The House is, as per the precise language used by the Supreme Court, “claim[ing] that [it is being] deprived of something to which [it] personally [is] entitled.” *Id.* at 2318. And, the institutional interest is not widely dispersed; it is particularized to the House of Representatives because the House’s composition will be affected by the manner in which the Bureau conducts the Census. “Standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury.” See *Lujan*, 504 U.S. at 561.

Furthermore, in declining to grant standing to the legislative plaintiffs in *Raines*, the majority “attach[ed] some importance to the fact that appellees ha[d] not been authorized to represent their respective Houses of Congress in this action.” *Raines*, 117 S. Ct. at 2322. Here, the House of Representatives has been granted authority by statute to prosecute this suit and to employ the services of outside counsel and other experts in so doing. See 1998 Appropriations Act § 209(g). Additionally, Justice Souter noted that the virtue of denying standing in *Raines* was only confirmed by the certainty that a private suit would surely follow. See *id.*



at 2325 (Souter, J., concurring). Here, defendants do not suggest that any other plaintiff would suffer an "actual," "personal and individual," and "concrete," injury, *see id.*, such that he could successfully mount a pre-census challenge. Consequently, if the House does not have standing, this question might evade review until after the possible seating of an unconstitutionally composed House.

In concluding that the House of Representatives has pleaded a legally cognizable injury and satisfied Article III, the specter of "general legislative standing" based upon claims that the Executive Branch is misinterpreting a statute or the Constitution is not raised. This is because the vast majority of legislation does not affect a legislature or a legislator in a concrete and particularized manner, and in a manner distinct from the general public. Only in an extremely rare case could a house of Congress claim that existing law, as interpreted and implemented by the Executive Branch, injures that house in a matter that satisfies Article III's rigorous demands. However, because the Executive's interpretation of existing law and the Constitution here affects the House's statutory right to receive information and ultimately will affect its composition, this suit is that extremely rare case.

#### B. Ripeness

In order for a matter to be justiciable by a federal court, that matter must be ripe for resolution. *See Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 81 (1978); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977). The doctrine of ripeness is intended "to prevent the courts, through avoidance of premature adjudication, from

entangling themselves in abstract disagreements." *Abbott Laboratories*, 387 U.S. at 148. While the ripeness doctrine prevents courts from reviewing injuries that are speculative, the Supreme Court has also established that "[o]ne does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). *See also New York v. United States*, 505 U.S. 144, 175 (1992).

#### 1 Article III Concerns

Article III requires not only that an injury be concrete and particularized, but also imminent or certainly impending. *See Lujan*, 504 U.S. at 560; *Whitmore*, 495 U.S. at 158; *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). As the Supreme Court noted this term, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 118 S. Ct. 1257, 1259 (1998) (quoting *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 580-81 (1985)). Defendants contend that a number of steps must occur before the "decision" of the Bureau to utilize statistical sampling in the 2000 census is ripe for review, and that many of these events may not occur at all. *See, e.g., Boehner v. Anderson*, 30 F.3d 156, 163 (D.C. Cir. 1994) (dismissing, on ripeness grounds, a challenge to a congressional pay raise statute because no quadrennial adjustment had been proposed or enacted).

Defendants first posit that Congress and the President may amend the Census Act to preclude sampling. *See Defendants' Motion to Dismiss* at 28. They allege that Congress has not yet reached its ultimate legisla-

tive conclusion as to whether statistical sampling will be part of the 2000 census. *See, e.g.*, 143 Cong. Rec. H10,931 (daily ed. Nov. 13, 1997) (statement of Rep. Dixon) (arguing that one of the purposes of the 1998 Appropriations Act was to “leave that fight [over statistical sampling] to be fought another day.”). They note that the 1998 Appropriations Act requires that “[s]ufficient funds appropriated under this Act or under any other Act for purposes of the 2000 decennial census shall be used by the Bureau of the Census to plan, test, and become prepared to implement a 2000 decennial census, *without using statistical methods*.” 1998 Appropriations Act § 209(j) (emphasis-added). Also, defendants point to the Secretary’s current dress rehearsals using both sampling and non-sampling methodologies. *See* Defendants’ Motion to Dismiss at 29. Defendants allege that both the reservation of funds for a non-sampling census and the dress rehearsals demonstrate that a non-sampling census is a present possibility, rendering this matter unripe.<sup>10</sup>

In the alternative, defendants claim that the matter should not be deemed ripe at least until the authorization of final funding for the 2000 Census. Defendants claim that, “[a]s demonstrated by the appropriations compromise, Congress has not yet decided how to fund Census 2000 and further debate both in Congress and between the political parties is sure to follow.” Defendants’ Motion to Dismiss at 30. The essence of defendants’ argument appears to be that the unresolved

<sup>10</sup> The House offers an alternative explanation for the non-sampling census preparations: the preparations allow the Bureau to move forward during the time required for the courts to resolve this legal controversy and be prepared should plaintiff prevail. *See* Plaintiff’s Opposition to Defendants’ Motion to Dismiss at 36.

funding issue guarantees at least one additional congressional “pass” at the census, which may result in a decision to proceed with a non-sampling census.

Ultimately, however, defendants do not argue that either the potential for supervening legislation or the need for final appropriations renders this matter constitutionally unripe for resolution. Rather, they contend that the disagreement will no longer be “abstract” only when the President transmits to Congress in 2001 “a statement showing the whole number of persons in each state . . . and the number of Representatives to which each State would be entitled.” *Franklin v. Massachusetts*, 505 U.S. 788, 792 (1992) (quoting 2 U.S.C. § 2a(a)). They claim that until the President issues his certification, the “effect” of Census 2000 is unknowable, and it would be only then that the House might suffer any cognizable injuries. “[N]o claim can be ripe before that [Presidential] certification.” Defendants’ Motion to Dismiss at 28. In sum, defendants claim that pre-census challenges are proscribed.

This court concludes that this matter is now ripe for resolution, because the alleged informational injury to the House is imminent and certainly impending, and not too speculative for Article III purposes. *See Lujan*, 504 U.S. at 560; *National Treasury Employees Union*, 101 F.3d at 1430.

Critical to this conclusion is that the House need not demonstrate that the use of statistical sampling will either alter state population totals or the resultant apportionment of representatives among the states. This is because the informational and compositional injuries originate from the *procedure* utilized for conducting the 2000 census. “[W]here a procedural violation is asserted, the courts have applied the imminence



requirement to the procedural violation, not to the discrete injury that might someday flow from such." *National Treasury Employees Union*, 101 F.3d at 1430-31 (citing *Lujan*, 504 U.S. at 572 n.7). In this case, the failure to utilize the methodology required by the Census Act and/or the Constitution constitutes a procedural violation. The matter therefore becomes ripe at the point at which use of this procedure is "certainly impending"—the point at which it is certain that the Bureau will employ statistical sampling in conducting the apportionment enumeration. That time is now.

The 1998 Appropriations Act, passed by both houses of Congress and signed into law by the President, expressly provides that the Census 2000 Report and the Census 2000 Operational Plan "shall be deemed to constitute *final agency action* regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding." 1998 Appropriations Act § 209(c)(2) (emphasis added). A final action is, by definition, not preliminary, procedural or intermediate. *See* 5 U.S.C. § 704. In light of this statutory declaration, this court is hard-pressed to understand how the statistical sampling plan can be construed as a merely tentative position, subject to reconsideration by the Bureau, the President, or Congress. The fact that the legislation deeming the Census 2000 Report as final agency action may have been the result of "compromise," or that it may have been passed with "political rancor," *see* Defendants' Motion to Dismiss at 19-21, does not direct this court to question the unambiguous declarations contained therein. Surely neither party proposes that a

court should give less weight to the plain text of a statute based upon the strength of the opposition.

The claimed injuries do not fail the immediacy test merely because the debate over sampling in Congress is ongoing, or because Congress may yet pass supervening legislation or take other actions that could moot the controversy. To ask the court to stay its hand because Congress hypothetically may amend the statutory framework of the Census Act as it now exists, or change the current methodology by attaching a rider to a future appropriations bill, or create a "census crisis" by refusing to fund the decennial enumeration, is asking the court to stay its hand based upon nothing more than mere speculation—the kind of speculation typically offered by a *plaintiff*. If Congress or the Executive should take an action that moots this controversy, the Supreme Court no doubt will act accordingly. *See, e.g., United States Dep't of Treasury v. Galioto*, 477 U.S. 556 (1986) (vacating judgment of the district court because Congress amended the statute under consideration). However, the fact that a case is capable of being rendered moot by congressional action does not, without more, make it unripe.

The holdings in *Texas v. United States*, 118 S. Ct. 1257 (1998) and *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994) do not dictate otherwise. In *Texas*, the Supreme Court addressed a declaratory judgment challenge to sections of the Texas Education Code requiring appointment of a master or management team to oversee poorly functioning school districts. The Court held that the challenge was not ripe for adjudication because no Texas school district had yet been affected by the statute. Whether a district would ever be required to appoint a master or a management team depended

upon a school falling below the state standards and upon the unsuccessful imposition of other remedial sanctions. See *Texas*, 118 S. Ct. at 1259. In other words, if specific steps did not transpire, there would never be an injury. Similarly, in *Boehner*, a Congressman's challenge to a pay raise statute was deemed "far from ripe" because no quadrennial salary adjustment had been proposed or enacted, nor was an adjustment scheduled to occur for at least another five years. Even then, Congress would have had to recommend a pay adjustment effective prior to the seating of a new Congress. See *Boehner*, 30 F.3d at 163. Again, contingent events X, Y, and Z had not occurred, and in the absence of those events, there would be no injury.

By sharp contrast, in the instant case, the injury is not dependent upon future events X, Y, and Z taking place. Nothing additional need occur for statistical sampling to be used in the 2000 census. Quite the opposite: "contingent future events that may not occur as anticipated, or indeed may not occur at all" are necessary for statistical sampling *not* to be utilized in the 2000 census for purposes of congressional apportionment. See *Texas*, 118 S. Ct. at 1259 (citation omitted).

Although it is true that approximately twenty months will pass between this date and Census Day 2000, it is also true that "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Buckley v. Valeo*, 424 U.S. 1, 114 (1976) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974)). That statement especially resonates in this matter,

where a "point of no return" arises at some indeterminate time prior to Census Day 2000. This "point of no return" exists because the Department of Commerce is compelled to make a number of preliminary determinations, most notably the number of enumerators to hire, based upon the methodology it will employ. See, e.g., Census 2000 Report at 37-39 (noting that using a non-sampling methodology would require 25,000 to 30,000 enumerators, as opposed to 5,000 with sampling, and explaining all the additional efforts and mandatory costs associated with utilizing a headcount-only method). Compare *New York v. United States*, 505 U.S. at 175 (noting that even though a take-title provision was not to take effect until a future date, the challenge was ripe because it takes years to construct a waste site).

Finally, *Franklin v. Massachusetts* does not support defendants' claim that all census challenges are premature prior to presidential certification under 2 U.S.C. § 2a(a). In *Franklin*, the Secretary of Commerce allocated 922,819 overseas military personnel to the state designated in their personnel records as their "home of record." The state of Massachusetts and two voters challenged this decision of the Secretary, claiming that it was inconsistent both with the Administrative Procedure Act and with the constitutional requirement that the apportionment of representatives be determined by an "actual Enumeration" of persons "in each state." See *Franklin*, 505 U.S. at 795. The Court rejected the challenge, holding that the Secretary's allocation decision was not final agency action because the President is not required to transmit the agency's report directly to Congress under 2 U.S.C. § 2a(a). The court noted that the "Secretary's report to the President carries no



direct consequences for the reapportionment" and that it is "the President, not the Secretary, [who] takes the final action that affects the states." *Franklin*, 505 U.S. at 798-99. In other words, the report had no independent impact on apportionment because the President had the power and the duty to either accept or reject the Secretary's proposed allocation of military personnel. "In this case, the action that creates an entitlement to a particular number of representatives is the President's statement to Congress, not the Secretary's report to the President." *Id.* at 797.

In the instant matter, by contrast, it is the Bureau that "takes the final action that affects the states," and the Census 2000 Report "carries . . . direct consequences for reapportionment." That is because this challenge affects the *manner* in which the decennial census will be conducted in order to generate the number—and the only number—that the President will receive from the Secretary. And, most critically, the President is *required* to use the data from the decennial census. *See id.* at 797. Unlike the allocation of military personnel decision in *Franklin*, the President here will not have an option to proceed in one manner over another as to whether statistical sampling should be used when he receives the Secretary's report. That decision will have been made for him by the "final agency action" of the Census 2000 Report and Census 2000 Operation Plan. Notably, if the Secretary conducted a two-number census, and the President could elect between statistical sampling and headcount enumeration options, it is probable that under *Franklin* a challenge to the census would not be ripe until the President made that election and sent his statement to Congress. However, as the 2000 enumeration is to be a

one-number census, "the action that creates an entitlement to a particular number of representatives and has a direct effect on reapportionment" is the final agency action of the Census 2000 Report. *See id.* at 797. Therefore, *Franklin* does not contradict, and in fact supports, the conclusion that this matter is presently ripe for adjudication.

For the above reasons, the court finds that Article III ripeness concerns are satisfied because the injuries claimed by plaintiff are sufficiently "imminent" and "certainly impending."

## 2. Prudential Concerns

"Prudentially, the ripeness doctrine exists to prevent the courts from wasting our resources by prematurely entangling ourselves in abstract disagreements, and, where, as here, other branches of government are involved, to protect the other branches from judicial interference until their decisions are formalized and their 'effects felt in a concrete way by the challenging parties.'" *National Treasury Employees Union*, 101 F.3d at 1431 (quoting *Abbott Laboratories*, 387 U.S. at 148-49). In deciding whether a controversy is prudentially ripe for adjudication, the Supreme Court directs consideration of two factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories*, 387 U.S. at 149. Of course, all prudential barriers to jurisdiction in this matter have been removed by statute. However, because the prudential concerns weigh so heavily in favor of exercising jurisdiction, the court will address them briefly.

First, the hardship from withholding court consideration prior to conducting the census is considerable. As

noted previously, a central feature of the 2000 enumeration is that it is designed to produce a "one-number census," meaning that the only figures that will be produced by the Bureau and forwarded to the President, and thereafter to Congress, will be based upon statistical sampling. *See* Census 2000 Operational Report at I-1, 5, IX-23. If this court does not rule on this question now, and thereafter a reviewing court concludes post-census that statistical sampling is statutorily or constitutionally proscribed, it will be impossible at that point to determine what the headcount-only number would have been. The only recourse would be to re-conduct the census, even though doing so would come too late for the House to fulfill its duties to oversee a constitutional census every decade. Furthermore, while the subsequent full headcount was being conducted, the House of Representatives would be unlawfully composed.

Second, the issues are currently fit for judicial decision. The questions presented are purely legal, involving only statutory and constitutional interpretation. The passage of additional time will not result in further elaboration of the record such that the task of determining whether the Census Act or Constitution forbids statistical sampling in the apportionment enumeration would be made easier or more concrete. Nor is the court faced with "too remote and abstract an inquiry for the proper exercise of the judicial function," merely because the census has not been funded or conducted and an apportionment not yet determined. *Texas v. United States*, 118 S. Ct. at 1260 (quoting *Longshoremen v. Boyd*, 347 U.S. 222, 224 (1954)). A particular application will not help the court "better

grasp[]" the relevant statutes and constitutional provisions. *See id.*

In light of the extreme hardship that would arise from this court staying its hand, and the fitness of the issues for judicial determination, there is "no better time to decide" this controversy. *Regional Rail Reorganization Act Cases*, 419 U.S. at 144.

### C. Equitable Discretion

Defendants offer another barrier to this court's reaching the merits of this case: that even if all Article III jurisdictional requirements are satisfied, the court should nonetheless decline to involve itself in a dispute between the political branches in the absence of a "constitutional impasse." *See Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring) ("Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority."). *Raines* specifically notes that courts should be wary of plunging into a "bitter political battle being waged between the President and the Congress." *Raines*, 117 S. Ct. at 2321. And, this circuit has a well-developed body of law calling for the exercise of "remedial" or "equitable" discretion to dismiss legislative suits even when Article III standing requirements are satisfied. *See Moore*, 733 F.2d at 955 (noting the need for flexibility in congressional suits to address separation of powers concerns); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1175 (D.C. Cir. 1983) (explaining that respect for coordinate branches of government counseled restraint in hearing a legislative suit); *Riegle v. Federal Open Market Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981) (calling for the exercise of judicial restraint when dispute was with other mem-



bers of Congress, relief could be obtained from fellow legislators, and private plaintiffs would have standing).

However, the specifics of this case lead this court to conclude that exercising equitable or prudential discretion to dismiss the complaint would be improvident.

By enacting section 209 of the 1998 Appropriations Act, both Congress and the President have invited the courts to resolve this issue. This direct invitation "significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit." *Raines*, 117 S. Ct. at 2318 n.3 (citing *Bennett*, 117 S. Ct. at 1162-63 (noting that a jurisdictional statute expands standing to the full extent allowed under Article III)); see also *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (same).

Of course, a federal court may not accept such an invitation to adjudicate when Article III prerequisites are not met. "[W]e must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency." *Raines*, 117 S. Ct. at 2318; see also *Gladstone*, 441 U.S. at 100 ("In no event, however, may Congress abrogate the Art. III minima."). And, as *Raines* notes, those Article III standing prerequisites are "especially rigorous" in cases in which a court may be called upon to determine whether an action taken by one of the other two branches of the federal government is unconstitutional. See *id.* at 2317-18. However, when the heightened Article III burden of establishing a personal, concrete, imminent and otherwise judicially cognizable injury is satisfied and a jurisdictional statute has been passed by Congress and signed into law by the President, the presumption should be in favor of a federal court's retaining jurisdiction. While there may

be some circumstances in which a court should decline to hear a case even when all constitutional requirements are met—such as where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it," *Baker v. Carr*, 369 U.S. 186, 217 (1962)—the court sees no reason to withdraw from litigation concerning the census. Courts routinely adjudicate these matters, frequently in instances where the disputes pit the states against the federal government.

In sum, even though this case involves litigation between the legislative and executive branches as to whether a decision of the executive violates the law or the Constitution, the fact that: 1) the House has satisfied Article III's "case" or "controversy" requirement; 2) a jurisdictional statute permits this plaintiff to bring the case; and 3) the federal courts routinely resolve census disputes, leaves no doubt that the court should resolve this matter.

#### D. Separation of Powers

Defendants' final argument for dismissal of this action involves separation of powers. As the Court noted in *INS v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J. concurring) separation of powers is violated when "one branch assumes a function that more properly is entrusted to another." Defendants argue that "because Article II of the Constitution entrusts litigation on behalf of the United States to the Executive rather than the Legislative Branch, neither Congress nor its Members may initiate litigation designed to vindicate the general public and governmental interest in the proper administration of federal law." See Defendant's Motion to Dismiss at 38. Defendants base this

contention in large part upon the Supreme Court's pronouncement in *Buckley v. Valeo* that:

the discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."

*Buckley*, 424 U.S. at 138 (quoting U.S. Const. Art. II, § 3); see also *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 274 (1991) ("[Congress] may not 'invest itself or its Members with either executive power or judicial power'" (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928))); *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.") (citing *Chadha*, 462 U.S. at 958). By "vesting itself" with the authority to initiate legal actions, defendants claim that the danger of either encroachment upon or aggrandizement of executive powers by the legislature is omnipresent. See *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (noting the need for caution when the separate branches exceed the outer limits of their power).

That a house of Congress may turn to the federal courts for vindication of certain concrete and particularized interests without violating separation of powers is well established. As discussed in greater detail earlier, legislative bodies have been permitted to invoke the

power of the federal courts to enforce a subpoena without violating separation of powers. See *Buckley*, 424 U.S. at 137-38; see also 2 U.S.C. § 288b(b) (authorizing Senate counsel to bring an action to enforce a subpoena); *Barry*, 279 U.S. at 618-19; *McGrain*, 273 U.S. at 174. The concept that the legislative branch may initiate legal process to obtain information necessary to legislate provides tacit support for the proposition that the House may initiate litigation to obtain information it needs to perform its apportionment function without violating separation of powers.

This litigation presents a somewhat different posture from the subpoena cases, as the House is not seeking to compel the production of information in the possession of another, but rather a judicial determination as to what the Census Act and/or Constitution require so as to ensure that the correct information is obtained. Nonetheless, the court concludes that permitting the House to prosecute this lawsuit in order to vindicate an Article III injury to itself does not violate separation of powers.

Defendants' invocation of *Buckley* fails to recognize that the House is not endeavoring to "take care that the laws be faithfully executed" or vindicate a general public interest in the proper administration of law, which are quintessential executive functions reserved exclusively to the Executive Branch. See *Buckley* 424 U.S. at 138. Rather, the House is pursuing legal process on its own behalf to prevent a legally cognizable injury to itself. It seeks to vindicate a personal, concrete, and particularized institutional interest—the receipt of census information that conforms with the Census Act and the Constitution to prevent it from becoming unlawfully composed. Compare *United States v. Will*, 449



U.S. 200, 209 (1981) (permitting federal judges to sue to obtain a determination as to whether congressional action violated the Compensation Clause). Distinguishing this lawsuit from that which the Court addressed in *Buckley* is perhaps best done through illustration.

Under 2 U.S.C. § 27, if the President believes that "from the prevalence of contagious sickness, or the existence of other circumstances" it would be hazardous to the health of members of Congress to meet at the seat of the government, the President may convene Congress at such a place "as he may judge proper." Presume that on the date before an important vote in the spring, the President concluded that the pollen count in the District of Columbia was sufficiently high so as to, "in the opinion of the President," constitute a "hazard" to the "health of the members." By proclamation, the President might require the House and Senate to convene at a location on the west coast or in the desert southwest where the pollen count was lower. It would be difficult to conclude that it would be a violation of separation of powers for either the House or the Senate to come to federal court and obtain a judicial declaration as to whether the President was exceeding his authority under 2 U.S.C. § 27. As courts have reaffirmed time and again, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

This hypothetical accurately portrays the situation presented in this suit. Congress has delegated to the Executive Branch, through the Census Act, the responsibility to conduct the decennial census and determine the number of persons in each state for purposes of apportionment. The Bureau has determined that for

the 2000 census it will use statistical sampling techniques to supplement the initial headcount enumeration. The House contends that this exercise of the Secretary's broad discretion violates both the Census Act and the Constitution. And, most critically, if the executive's interpretation of the statute is, in fact, contrary to the law or the Constitution, the most directly affected entity is the institution of the House of Representatives, because of its mandatory duty to apportion representatives based upon a lawful and constitutional decennial census, and because of its legally cognizable interest in its lawful composition. Consequently, the same limiting principle showing that today's holding does not create general legislative standing (*see* Part II.A.4., above) also demonstrates that we need not be concerned here with the principle of separation of powers. The House may file suit only when it satisfies the rigorous injury in fact requirements of Article III, and not whenever there is alleged executive branch noncompliance with federal law.

Having determined that: 1) the House of Representatives has Article III standing; 2) the matter is ripe for resolution; 3) dismissal on an equitable basis is not called for, and, 4) the doctrine of separation of powers is not violated, the court will now turn its attention to the merits.

### III. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In *Wisconsin v. New York*, the Supreme Court addressed a challenge to the Secretary of Commerce's decision not to adjust statistically the headcount results from the 1990 enumeration. In holding that the Secretary's decision was "entirely reasonable," the Court

noted the “virtually unlimited discretion” that the Secretary has over the census by virtue of Congress’ broad delegation through the Census Act. *Wisconsin*, 517 U.S. at 18-19, 24. However, the Court expressly noted that it was not being called upon to decide “whether the Constitution might prohibit Congress from conducting the type of statistical adjustment considered here” or “the precise bounds of the authority delegated to the Secretary through the Census Act.” *Id.* at 20 nn.9, 11. Most notably, because the *Wisconsin* challenge centered around whether sampling was required, as opposed to proscribed, the Court did not have occasion to consider Oklahoma’s argument that “Congress has constrained the Secretary’s discretion to statistically adjust the decennial census [through 13 U.S.C. § 195].” *Id.* at n.11. The question left unresolved in *Wisconsin*—whether, as an exercise of his discretion, the Secretary may employ statistical sampling to determine the population for purposes of congressional apportionment without violating either the Census Act or the Constitution—is squarely before this court.

#### A. The Census Act

The interpretation of two provisions of the Census Act, sections 141(a) and 195, is ultimately determinative as to whether statistical adjustment to the initial headcount is permissible or proscribed.<sup>11</sup> These provisions

<sup>11</sup> This statutory analysis does not require the court to give deference to the agency’s interpretation pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). First, as will be demonstrated, the plain language and legislative history leave no doubt as to the purpose underlying Congress’ promulgation of the 1976 amendments to the Census Act. “If the intent of Congress is clear, that is the end of the matter.” *Id.* at 842. Second, the Secretary of Commerce has

were last amended in 1976, and the resolution of this dispute depends upon the substantive effect of the amendments. Plaintiff contends that while the 1976 amendments encourage, if not require, the extensive use of sampling to collect the myriad of general demographic information that the Bureau is obliged to compile under the Census Act—from occupational to educational to income—they do not permit the use of statistical sampling to determine population for purposes of apportionment. Defendants allege that Congress’s grant of authority to use sampling techniques extends to the apportionment enumeration. Other courts that have addressed these two sections and the effect of the 1976 amendments have rejected the view that the Census Act prohibits statistical sampling. See *City of New York v. Department of Commerce*, 34 F.3d 1114, 1124-25 (2d Cir. 1994), *rev’d on other grounds sub nom.*, *Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980) (concluding that the Bureau may only use sampling in addition to more traditional methods of enumeration); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev’d on other grounds*, 652 F.2d 617 (6th Cir. 1981). For the following reasons, the court must disagree.

reversed his position on this issue, see 45 Fed. Reg. 69,366, 69371-73 (1980), and the new position is entitled to “considerably less deference than a consistently held agency view.” See *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 515 (1994) (citations omitted). Finally, the Secretary has not amply justified his change of interpretation with a “reasoned analysis.” See *Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983)).



### 1. The Pre-1976 Law

Prior to 1957, Congress did not identify any manner in which the decennial census was to be conducted. In 1957, in an effort to make "the various census activities . . . more uniform, modern and practicable," see H.R. Rep. No. 85-1043, at 1 (1957), Congress enacted 13 U.S.C. § 195, which provided:

[e]xcept for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title.

Pub. L. No. 85-207, 71 Stat. 481, 483-84 (1957).

It cannot reasonably be disputed that this version of section 195 distinguished between congressional apportionment and other census data collection activity regarding statistical sampling, proscribing its use in the former. The legislative history is eminently clear on this issue.

Section 195 provides that the Secretary of Commerce may authorize the use of the statistical method known as sampling in carrying out the purposes of title 13, if he deems it appropriate. However, section 195 does not authorize the use of sampling procedures in connection with apportionment of Representatives.

The purpose of Section 195 in authorizing the use of sampling procedures is to permit the utilization of something less than a complete enumeration, as implied by the word "census," when efficient and accurate coverage may be effected through a

sample survey. Accordingly, except with respect to apportionment, the Secretary of Commerce may use sampling procedures when he deems it advantageous to do so.

H.R. Rep. 85-1043, at 10. Additionally, the pre-1976 version of § 141 did not mention the use of statistical sampling.

There is also little question that the primary purpose of the 1976 legislation on the Census Act was to authorize the Secretary of Commerce to conduct a mid-decade census. See S. Rep. No. 94-1256, at 1 (1976); *Franklin v. Massachusetts*, 505 U.S. at 816-17 n.16. Whether the existing prohibition against the use of sampling to determine population for apportionment purposes was also eliminated through the amendments is the question to which the court now turns.

### 2. The 1976 Amendments and Their Effect

Three preliminary points must be addressed before this court considers whether the 1976 amendments altered the manner in which the Secretary may conduct the apportionment enumeration. First, "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). Given that settled law proscribed sampling in the apportionment census, the burden here falls on defendants. Second, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989) (quoting *Edward J. DeBartolo Corp. v. Florida*

*Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)); see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). Finally, the court notes that for the 1980 census, the first enumeration affected by the 1976 amendments, the Department of Commerce took the position that statistical sampling in connection with the apportionment enumeration remained prohibited. See *Census Undercount Adjustment: Basis for Decision*, 45 Fed. Reg. 69,366, 69,371-73 (1980) ("Thus, Title 13 clearly continues the constitutional mandate and historical precedent of using the 'actual Enumeration' for purposes of apportionment, while eschewing estimates based on sampling or other statistical procedures, no matter how sophisticated.").

a. Section 195

i. Plain Text

Amended section 195 provides:

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Defendants point to "the extraordinary clarity of the statutory text," Defendants' Summary Judgment Opposition at 37, as they argue that the discretion to decide whether to use statistical sampling for congressional apportionment is now committed to the Secretary. Defendants note that the 1976 amendments to section 195 altered the call for non-apportionment use of statistical sampling methods from "may," which is an

authorization, to "shall," which is a mandate.<sup>12</sup> Defendants argue that an exception from a mandate is not a *prohibition* in the area covered by the exception; instead, the area covered by the exception is *discretionary*. See Defendants' Motion to Dismiss at 59-60.

To illustrate defendants' interpretation of how this sentence structure operates, consider the directive, "Except for Mary, all children at the party shall be served cake." That all children other than Mary must be served cake is beyond dispute. However, that mandate does not affirmatively prohibit the host from serving cake to Mary. The decision as to whether to serve cake to Mary is, by defendants' understanding of the instruction, a matter left to the host's discretion. Applied to the instant case, defendants claim that with respect to apportionment, current section 195 commits the decision to use sampling to the discretion of the Secretary.

Defendants cite several examples from the United States Code supporting their interpretation of the "except . . . shall" structure, in which an exception from a mandate that a federal officer "shall" do something does not constitute a prohibition in the area covered by the exception. The provision:

[e]xcept in emergencies, any regulations of the Secretary promulgated under this section shall be

<sup>12</sup> *Amici Washington Legal Foundation, et al.* contend that the second clause of § 195 is not truly a 'mandate' to use sampling. By directing the Secretary to use sampling "if he considers it feasible," its use is still effectively left to the discretion of the Secretary. See Brief of Washington Legal Foundation at 17. Because this point does not affect the outcome of this analysis, the court declines to address it in detail.



put into effect only after consultation with the appropriate fish and game agency,

does not forbid the Secretary of the Interior from consulting with fish and game agencies in an emergency if he so chooses. *See* 16 U.S.C. § 230d; *see also* 16 U.S.C. §§ 459i-4, 460w-4. Similarly, the directive in 5 U.S.C. § 555(e) that:

[e]xcept in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial,

does not proscribe the issuance of a brief statement when affirming a prior denial. At least one court has read section 195 in this manner. *See City of Philadelphia v. Klutznick*, 503 F. Supp. at 679 ("Thus, although the Bureau is not *required* to make statistical adjustments, it is not expressly *prohibited* from doing so.") (emphasis in original).

Though defendants' interpretation of the except/shall sentence structure is proper in some instances, the court finds it to be strained and incorrect when applied to amended section 195. Common sense and background knowledge concerning the subject matter of the exception dictates that the "except" clause must be read as prohibitory.

First, an exception from a command to do "X" more often than not represents a prohibition against doing "X" with respect to the subject matter covered by the exception. In the party hypothetical, one would expect that the person who issued the directive "except for Mary, all children at the party shall be served cake" would be quite surprised to learn that Mary had been served cake.

This reading of the except/shall structure becomes even more obvious when one knows something special about the subject matter of the excepted class that would make it highly unlikely that its treatment would be committed to the discretion of another. Consider the directive "except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners." It is far more likely that the granddaughter would be upset if the recipient of her directive were to take the wedding dress to the cleaners and subsequently argue that she had left this decision to his discretion. The reason for this result, as contrasted with the cake example, is because of our background knowledge concerning wedding dresses: We know that they are extraordinarily fragile and of deep sentimental value to family members. We therefore would not expect that the decision to take a dress to the cleaners would be purely discretionary.

The apportionment of congressional representatives among the states is the wedding dress in the closet. We have a prior understanding that demands the conclusion that whether to use statistical sampling is not to be left to the discretion of the Secretary of Commerce absent a more direct congressional pronouncement. The apportionment function is, after all, the "sole constitutional purpose of the decennial enumeration." 1998 Appropriations Act § 209(a)(1). The manner in which it is conducted may impact not only the distribution of representatives among the states, but also the balance of political power within the House. And, the apportionment has a direct effect upon the presidency as well, as the number of electors in the electoral college is "equal to the whole Number of Senators and Representatives to which the State may be entitled in the

Congress.” Art. II, § 2, cl. 2. That the congressional apportionment function merits particularized treatment is best demonstrated by the fact that when Congress first authorized the use of sampling in 1957, that function was expressly excepted. Having been completely explicit then, it is hard to believe that Congress decided to rely upon subtle shifts in language to direct the opposite in 1976.

In light of the special position occupied by congressional apportionment in the universe of functions entrusted to the Bureau of the Census, the most logical reading of the effect of the amendments to section 195 is that while they strengthen the call for sampling in non-apportionment information gathering, they do not have the implicit collateral effect of transforming what was formerly an absolute proscription into a matter of pure agency discretion. Ultimately, the court agrees with plaintiff’s assertion that “[d]efendants’ argument that Congress eliminated a 200 year old prohibition against the use of statistical estimation techniques in the constitutional census by way of a permissive negative inference from an exception to a statutory mandate is wholly implausible.” Plaintiff’s Summary Judgment Reply at 11.

#### ii. Legislative History

Even if the meaning of section 195 could not be resolved from the face of the statute, the legislative history of the 1976 amendments would leave no doubt that the minor textual modifications do not work an historic change in the manner in which the Secretary is permitted to conduct the apportionment enumeration. Compare 45 Fed. Reg. at 69,372 (“The legislative history of Title 13 makes it eminently clear that sampling was not to be used in apportionment.”).

It is a cardinal principle of statutory interpretation that dramatic departures from past practices should not be read into statutes without a definitive signal from Congress. “[I]f Congress had such an intent [to exclude judicial elections from § 2 of the Voting Rights Act because of the inclusion of the word “representatives”] Congress would have made it explicit in the statute, or at least some Members would have identified or mentioned it at some point in the unusually extensive legislative history.” *Chisom v. Roemer*, 501 U.S. 380, 396 (1991); see also *Connecticut National Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring) (“If Congress had intended such a significant change . . . some indication of this purpose would almost certainly have found its way into the legislative history.”); *United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) (Scalia, J.) (“It is a venerable rule, frequently reaffirmed by the Supreme Court, that ‘repeals by implication are not favored,’ and will not be found unless an intent to repeal is ‘clear and manifest.’”) (citations omitted). Perhaps the most eloquent statement of this concept comes from then-Justice Rehnquist, writing in dissent in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980):

In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.

(quoted in *Chisom*, 501 U.S. at 396 n.23).

Despite defendants’ characterization of the force of the legislative history, and the characterization of at



least one reviewing court, *see City of New York*, 34 F.3d at 1125, the court finds no indication that the watchdog barked in the night.

Again, the court notes that the primary rationale behind amending the Census Act in 1976 was to establish the mid-decade census. *See* S. Rep. No. 94-1256, at 1 (1976). On the issue of sampling, the Conference Report language upon which defendants primarily rely states:

Section 7 of the House bill amends section 195 of title 13 to require that the Secretary of Commerce authorize the use of sampling procedures in carrying out the provisions of such title whenever he deems it feasible, except in the apportionment of the U.S. House of Representatives. This differs from the present provisions of section 195 which grant the Secretary discretion to use sampling when it is considered appropriate. This section, as amended, strengthens the congressional intent that, whenever possible, sampling shall be used.

H.R. Conf. Rep. No. 94-1719, at 13 (1976); *see also* S. Rep. No. 94-1256, at 6 (same with minor textual changes).

This language re-enforces what is obvious from the plain text of amended section 195: that Congress was issuing a much stronger directive to the Department of Commerce to employ sampling methodologies in most aspects of its Title 13 data gathering responsibilities. However, Congress's explicit directive again includes that ubiquitous qualifier—"except in the apportionment of the U.S. House of Representatives." The inclusion of this "except" language must be read to mean that one area was affirmatively carved out from the general

desire to augment the use of sampling—the area of the congressional apportionment enumeration. The second sentence of the excerpted language is even more damaging to defendants' argument, as it states that the only difference between the old and the new section 195 is a *reduction* in the Secretary's discretion to use sampling, not a categorical *creation* of discretion in an area in which he previously had none. *See Franklin*, 505 U.S. at 816-17 n.16 (noting the limitation upon the Secretary's authority in the nonapportionment census).

The absence of the legislature's bark is all the more compelling when one considers what the watchdog is guarding. In *United States v. Bass*, 404 U.S. 336, 349 (1971), the Supreme Court noted that a plain statement of intent to change the meaning of a statute is especially vital in "traditionally sensitive areas" because "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." Subsequently, in *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991), the D.C. Circuit applied that rule of statutory analysis to instances in which the balance of power between branches of the federal government would be affected. "Although the 'clear statement' rule was originally articulated to guide interpretation of statutes that significantly alter the federal-state balance, there are similar compelling reasons to apply the rule to statutes that significantly alter the balance between Congress and the President." *Id.* *Bass* and *Armstrong* together indicate that in an instance such as this, where the discretion afforded the executive on a matter affecting the composition of another co-equal branch would be dramatically altered, an especially clear signal by the legislature is mandated. None is

present. Not only is there no indication in either the House or the Senate Reports that Congress intended to change the discretion afforded the Executive Branch, but the record is also conspicuously devoid of hearings, investigations and other legislative fact-finding efforts on the issue of statistical sampling in 1976. The House of Representatives' apparent lack of interest in a statutory modification that goes to the fundamental matter of its composition cannot be ignored by the court. See *Connecticut National Bank*, 503 U.S. at 255 (Stevens, J., concurring) ("The silence tends to support the conclusion that no such change was intended.") (citation omitted).

Finally, this court agrees with plaintiff's contention that "[i]t borders on the absurd that Congress would enact such a momentous change in such an oblique fashion." Plaintiff's Motion for Summary Judgment at 36. Had Congress wished to authorize sampling techniques employed in the apportionment enumeration, it could have done so quite simply by either: a) deleting the "except" clause in its entirety; or, b) modifying the clause so as to affirmatively declare what defendants claim to be true by implication; that the Secretary may, in the exercise of his discretion, use sampling techniques to supplement the initial headcount enumeration to determine population for apportionment. Compare *Landgraf v. USI Film Products*, 511 U.S. 244, 262 (1994) ("[P]etitioner's statutory argument would require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message."). Because of the straightforward

means available to Congress to accomplish its purported goal, this court declines to ascribe to Congress the "surprisingly indirect route" that defendants advance.

Defendants have not met their *Bock Laundry* burden of showing that through the 1976 amendments to 13 U.S.C. § 195, Congress intended to change settled law and permit the use of sampling techniques to determine population for apportionment of representatives among the states.

b. Section 141(a)

i. Plain Text

Whatever strength there is to the claim that using statistical sampling in the apportionment enumeration does not violate the Census Act comes from the fact that section 195 must be read together with the other provision addressing sampling methodologies: section 141(a). See *City of New York*, 34 F.3d at 1124; *Carey v. Klutznick*, 508 F. Supp. at 415; Census 2000 Report at 53.

Prior to 1976, section 141(a) did not address sampling procedures. The post-1976 version states, in relevant part:

The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population . . . in such form and content as he may determine, *including the use of sampling procedures and special surveys* (emphasis added).

Defendants point to the addition of the emphasized language to claim that statistical sampling for purposes of apportionment is presently permissible. In support of this assertion, they note that section 141(a) con-



stitutes the Secretary's sole authority to take the decennial census of the population. They also note that section 141(b), which directly addresses the congressional apportionment function, references the "tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several states." In essence, defendants claim that because the congressional apportionment function described in section 141(b) expressly calls for the use of population data obtained under subsection (a), and subsection (a) permits the use of sampling procedures and special surveys to obtain those data, sampling procedures and special surveys must be permissible in tabulating total population for the apportionment of representatives.

The House contends that the amendments to section 141(a) cannot be read as an authorization to use sampling for congressional apportionment. It notes that the term "census of population" in section 141(a) is broadly defined in section 141(g) to include far more than the congressional apportionment enumeration, including "population, housing, and matters related to population and housing." Therefore, under plaintiff's understanding of how the two provisions co-exist, section 141(a)'s references to sampling and special surveys applies only to the myriad of demographic data that the Bureau collects in conjunction with the decennial enumeration. The House claims that the broad authorization of section 141 to use sampling in most aspects of data collection cannot affect the prohibition concerning apportionment in section 195, because, if it did, the "except" clause of section 195 would be rendered meaningless. See *Bennett*, 117 S. Ct. at 1166 ("[i]t is our duty

'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section") (citation omitted).

To the extent that section 141(a), which standing alone appears to permit statistical sampling in congressional apportionment, and section 195, which indisputably proscribes the same, conflict, the rules of statutory construction dictate the resolution. The more specific provision controls the general. "A general statutory rule usually does not govern unless there is no more specific rule." *Bock Laundry*, 490 U.S. at 524; see also *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the enactment.'" *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957) (quoting *MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944)) (quoting *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932)).

Aware of this rule of construction, the parties naturally dispute which of the two provisions is the specific and which is the general. In this case, the section headings—which were enacted into positive law along with the statutory text, see Pub. L. No. 94-521, § 7, 90 Stat. 2459, 2461 (1976) (Section 141); Pub. L. No. 85-207, 71 Stat. 484 (1957) (Section 195)—definitively resolve this conflict. Section 141 is entitled "Population and Census Information"; section 195 is captioned "Use of Sampling." As between the two, section 195 is clearly the more specific, and therefore controlling to the extent that the two provisions conflict. The precise question that this court is called upon to resolve is whether statistical sampling in the apportionment enumeration

violates the Census Act. The answer to that question must be gleaned from the provision that addresses when sampling may be used (and when it may not) over the section that gives the Secretary the broad authority to conduct the entire decennial census. Consequently, while § 141 permits sampling techniques and surveys in the conduct of the decennial census, that general grant is subject to the more specific "Use of Sampling" directive in § 195, which, as explained above, explicitly proscribes the use of sampling for apportioning representatives among the states.

## ii. Legislative History

As with section 195, a definitive signal that Congress intended the amendment to section 141(a) to work a fundamental change in the manner in which the Secretary could conduct his population tabulation responsibilities is strikingly absent. "The legislative history evidences no intention to expand the scope of the Secretary's discretion." *Franklin v. Massachusetts*, 505 U.S. at 816-17 n.16.

The Conference Report states:

Section 141(a) of title 13, as amended by section 5(a) of the House bill, provides for the decennial census, and is *essentially the same as the provisions of existing law, except that a reference is made . . . to the use of sampling procedures and special surveys.*

H. Conf. No. 94-1719, at 11 (emphasis added).

This statement is far from a clarion call announcing a fundamental change in the conduct of the only constitutional aspect of the census. The Conference Report explicitly notes that the subsequent law is to be "essentially the same as existing law." Existing law, of

course, proscribed the use of statistical sampling for purposes of congressional apportionment. *See supra*; *see also* 45 Fed. Reg. 66,372; Defendants' Summary Judgment Opposition at 40 ("In addition, Congress knew that, in enacting the 1976 amendments to sections 141 and 195, it was departing from preexisting law."). The only other significant language in the Conference Report is the final clause, but it strains credulity to translate the statement "reference is made . . . to the use of sampling procedures" into "sampling procedures may now be used to enumerate the population for congressional apportionment, thereby abandoning the longstanding methodology by which we count people." *See Wisconsin*, 517 U.S. at 11 (citing the Secretary's statement that "large-scale statistical adjustment of the census . . . would 'abandon a two hundred year tradition of how we actually count people' and that this change would be a step of 'magnitude'").

Nor is the Senate Report helpful. It states that "[n]ew language is added at the end of the subsection to encourage the use of sampling and surveys in the taking of the decennial census." S. Rep. No. 94-1256, at 4. As explained previously, the term "decennial census" encompasses much more than the population tabulation used to apportion representatives among the states. *See* 13 U.S.C. § 141(g). Therefore, this statement may be easily reconciled with the court's conclusion that sampling should be used in any and all areas in which that use is legal and/or constitutional, but that it may not be used in the apportionment of representatives among the states.

Reading section 141(a) and section 195 together, and considering the plain text, legislative history and other tools of statutory construction, this court finds that the



use of statistical sampling to determine the population for purposes of the apportionment of representatives in Congress among the states violates the Census Act.

#### B. Constitutional Grounds

A federal court is directed to avoid deciding matters on constitutional grounds when the matter may be resolved on another basis. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1945); see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909) ("Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and not departed from without important reasons."). Because this court finds that the Census Act prohibits the use of statistical sampling to determine the population for the purpose of apportionment of representatives among the states, there is no need to reach the constitutional questions presented.

A separate order and injunction shall issue this date.  
Circuit Judge Ginsburg and Judge Urbina concur.

/s/ ROYCE C. LAMBERTH  
ROYCE C. LAMBERTH  
United States District  
Judge

DATE: 8-24-98

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 98-0456  
Three Judge Court  
(RCL, DGH, RMU)

UNITED STATES HOUSE OF REPRESENTATIVES,  
PLAINTIFF

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

and

RICHARD A. GEPHARDT, ET AL.;  
LEGISLATURE OF THE STATE OF CALIFORNIA, ET AL.;  
CITY OF LOS ANGELES, ET AL.;  
NATIONAL KOREAN AMERICAN SERVICE &  
EDUCATION CONSORTIUM, INC., ET AL  
INTERVENOR-DEFENDANTS

[Filed: Aug. 24, 1998]

**ORDER AND JUDGMENT**

This matter comes before the court on defendants' and intervenor-defendants' motions to dismiss pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, and plaintiff's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Upon consideration of the memoranda of

the parties, oral argument, the relevant legal authorities and the entire record, and for the reasons stated in the accompanying Memorandum Opinion issued this date, it is hereby

ORDERED that the motions to dismiss of the Department of Commerce, *et al.*; Richard A. Gephardt, *et al.*; Legislature of the State of California, *et al.*; City of Los Angeles, *et al.*; and the National Korean American Service & Education Consortium, Inc., *et al.*, are DENIED; and it is further

ORDERED that plaintiff's motion for summary judgment is GRANTED. SUMMARY JUDGMENT is hereby entered for plaintiff. The use of statistical sampling to determine the population for purposes of apportioning representatives in Congress among the states violates the Census Act, 13 U.S.C. § 1 *et seq.* Accordingly, it is hereby

ORDERED that defendants are permanently enjoined from using any form of statistical sampling, including their program for nonresponse follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment.

/s/ ROYCE C. LAMBERTH  
ROYCE C. LAMBERTH  
United States District  
Judge

DATE: 8-24-98



**APPENDIX B**

IN UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civ. A. No. 98-0456  
Three Judge Court  
(RCL, DGH, RMU)

UNITED STATES HOUSE OF REPRESENTATIVES,  
PLAINTIFF

*v.*

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
DEFENDANTS

and

RICHARD A. GEPHARDT, ET AL.;  
LEGISLATURE OF THE STATE OF CALIFORNIA, ET AL.;  
CITY OF LOS ANGELES, ET AL.;  
NATIONAL KOREAN AMERICAN SERVICE &  
EDUCATION CONSORTIUM, INC., ET AL  
INTERVENOR-DEFENDANTS

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[Aug. 25, 1998]

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**NOTICE OF APPEAL**

Pursuant to Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, P. L. No. 105-119, 111 Stat. 2482 (1997), codified at 13 U.S.C. § 141

note, defendants United States Department of Commerce, William M. Daley, Secretary of the United States Department of Commerce, Bureau of the Census, and James F. Holmes, Acting Director of the Bureau of the Census, hereby appeal to the United States Supreme Court from the Order and Judgment and Memorandum Opinion filed by this Court on August 24, 1998.

Respectfully submitted,

FRANK W. HUNGER  
Assistant Attorney  
General

WILMA A. LEWIS  
United States Attorney

DENNIS G. LINDER  
Director  
Federal Programs  
Branch

## APPENDIX C

Article I, Section 2, Clause 3 of the United States Constitution provides as follows:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Section 141 of Title 13, United States Code, provides as follows:

**§ 141. Population and other census information**

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In

connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the



decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1) If—

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census—

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.

Section 195 of Title 13, United States Code, provides as follows:

**§ 195. Use of sampling**

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Section 209 of the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2480-2483 (1997), provides as follows:

**SEC. 209.(a) Congress finds that—**

(1) it is the constitutional duty of the Congress to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and laws of the United States;

(2) the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States;

(3) section 2 of the 14th article of amendment to the Constitution clearly states that Representatives are to be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State";

(4) article I, section 2, clause 3 of the Constitution clearly requires an "actual Enumeration" of the population, and section 195 of title 13, United States Code, clearly provides "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title.";

(5) the decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs;

(6) it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States;



(7) the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census;

(8) the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted; and

(9) Congress is committed to providing the level of funding that is required to perform the entire range of constitutional census activities, with a particular emphasis on accurately enumerating all individuals who have historically been undercounted, and toward this end, Congress expects—

(A) aggressive and innovative promotion and outreach campaigns in hard-to-count communities;

(B) the hiring of enumerators from within those communities;

(C) continued cooperation with local government on address list development; and

(D) maximized census employment opportunities for individuals seeking to make the transition from welfare to work.

(b) Any person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to deter-

mine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

(c) For purposes of this section—

(1) the use of any statistical method as part of a dress rehearsal or other simulation of a census in preparation for the use of such method, in a decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress shall be considered the use of such method in connection with that census; and

(2) the report ordered by title VIII of Public Law 105-18 and the Census 2000 Operational Plan shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding.

(d) For purposes of this section, an aggrieved person (described in subsection (b)) includes—

(1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action;

(2) any Representative or Senator in Congress; and

(3) either House of Congress,

(e)(1) Any action brought under this section shall be heard and determined by a district court of three judges in accordance with Section 2284 of title 28, United States Code. The chief judge of the United

States court of appeals for each circuit shall, to the extent practicable and consistent with the avoidance of unnecessary delay, consolidate, for all purposes, in one district court within that circuit, all actions pending in that circuit under this section. Any party to an action under this section shall be precluded from seeking any consolidation of that action other than is provided in this paragraph. In selecting the district court in which to consolidate such actions, the chief judge shall consider the convenience of the parties and witnesses and efficient conduct of such actions. Any final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under this section may be issued by a single Justice of the Supreme Court.

(2) It shall be the duty of a United States district court hearing an action brought under this section and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any such matter.

(f) Any agency or entity within the executive branch having authority with respect to the carrying out of a decennial census may in a civil action obtain a declaratory judgment respecting whether or not the use of a statistical method, in connection with such census, to determine the population for the purposes of the apportionment or redistricting of Members in Con-

gress is forbidden by the Constitution and laws of the United States.

(g) The Speaker of the House of Representatives or the Speaker's designee or designees may commence or join in a civil action, for and on behalf of the House of Representatives, under any applicable law, to prevent the use of any statistical method, in connection with the decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress. It shall be the duty of the Office of the General Counsel of the House of Representatives to represent the House in such civil action, according to the directions of the Speaker. The Office of the General Counsel of the House of Representatives may employ the services of outside counsel and other experts for this purpose.

(h) For purposes of this section and section 210—

(1) the term "statistical method" means an activity related to the design, planning, testing, or implementation of the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add or subtract counts to or from the enumeration of the population as a result of statistical inference; and

(2) the term "census" or "decennial census" means a decennial enumeration of the population.

(i) Nothing in this Act shall be construed to authorize the use of any statistical method, in connection with a decennial census, for the apportionment or redistricting of Members in Congress.

(j) Sufficient funds appropriated under this Act or under any other Act for purposes of the 2000 decennial census shall be used by the Bureau of the Census to



plan, test, and become prepared to implement a 2000 decennial census, without using statistical methods, which shall result in the percentage of the total population actually enumerated being as close to 100 percent as possible. In both the 2000 decennial census, and any dress rehearsal or other simulation made in preparation for the 2000 decennial census, the number of persons enumerated without using statistical methods must be publicly available for all levels of census geography which are being released by the Bureau of the Census for: (1) all data releases before January 1, 2001; (2) the data contained in the 2000 decennial census Public Law 94-171 data file released for use in redistricting; (3) the Summary Tabulation File One (STF-1) for the 2000 decennial census; and (4) the official populations of the States transmitted from the Secretary of Commerce through the President to the Clerk of the House used to reapportion the districts of the House among the States as a result of the 2000 decennial census. Simultaneously with any other release or reporting of any of the information described in the preceding sentence through other means, such information shall be made available to the public on the Internet. These files of the Bureau of the Census shall be available concurrently to the release of the original files to the same recipients, on identical media, and at a comparable price. They shall contain the number of persons enumerated without using statistical methods and any additions or subtractions thereto. These files shall be based on data gathered and generated by the Bureau of the Census in its official capacity.

(k) This section shall apply in fiscal year 1998 and succeeding fiscal years.

① LB  
W

OCTOBER TERM, 1997

No. 98-404

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., APPELLANTS

v.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

- ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JOINT MOTION TO EXPEDITE CONSIDERATION  
OF JURISDICTIONAL STATEMENT AND TO ESTABLISH  
EXPEDITED SCHEDULE FOR BRIEFING AND ARGUMENT  
IF PROBABLE JURISDICTION IS NOTED

The district court in this case has held that the Commerce Department's plan to employ statistical sampling in conducting the decennial census for the year 2000 would violate the Census Act. The jurisdiction of the district court was based on Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2482. Section 209(e)(1) also provides that "[a]ny final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the United States." 111 Stat. 2482. A notice of appeal to this Court was filed on August 25, 1998. The Solicitor General, on behalf of the federal defendants in this case, filed a jurisdictional



statement on September 4, 1998.

Section 209(e)(2) of the Appropriations Act states that "[i]t shall be the duty of a United States district court hearing an action brought under this section and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of" any suit brought pursuant to Section 209(e)(1) to challenge the Commerce Department's plan for conducting the decennial census. 111 Stat. 2482. Accordingly, the parties jointly move to expedite consideration of the jurisdictional statement and to establish an expedited schedule for briefing and argument if probable jurisdiction is noted.

The jurisdictional statement was filed on September 4, 1998. Appellee House of Representatives agrees that the Court should note probable jurisdiction, and for that reason will not file any response to the jurisdictional statement.

We respectfully propose that the Court adopt one of the following alternative briefing schedules. The first is proposed so that argument can be heard on November 30, 1998, the first day of the Court's December argument session. The second schedule is proposed so that argument could be heard two weeks earlier, on November 16, 1998. Although that date is not set aside on the Court's calendar for oral argument, the Court is scheduled to sit on that day. Under the first schedule, the opening briefs on the

merits for the appellants and the intervenor-defendants would be filed on October 6, 1998; the appellee's brief on the merits would be filed on November 3, 1998; the reply briefs for the appellants and the intervenor-defendants would be filed on November 17, 1998; and oral argument would be held on November 30, 1998. Under the second schedule, the opening briefs on the merits for the appellants and the intervenor-defendants would be filed on October 1, 1998; the appellee's brief on the merits would be filed on October 29, 1998; the reply briefs for the appellants and the intervenor-defendants would be filed on November 9, 1998; and oral argument would be held on November 16, 1998.

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives \* \* \* shall be apportioned among the several States \* \* \* according to their respective Numbers," and directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." *Ibid.* See also Amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

Pursuant to the Census Clause, Congress has enacted the Census

Act, 13 U.S.C. 1 et seq. The Act provides, inter alia, that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, \* \* \* in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). The Act further states that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195.

2. The district court order from which this appeal is taken arose out of a suit filed by the United States House of Representatives in the District Court for the District of Columbia. The district court held that the House had standing to sue and that the alleged harms were sufficiently immediate to satisfy the requirements of Article III. On the merits, the court held that 13 U.S.C. 195 prohibits the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States.

3. As pointed out above, Section 209(e)(2) of the Appropriations Act states that "[i]t shall be the duty of \* \* \* the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of" a case

filed under Section 209(e)(1) of that Act to challenge the Commerce Department's plan for conducting the decennial census. 111 Stat. 2482. In addition, the Commerce Department is required by law to prepare to implement the 2000 census without the use of statistical sampling techniques. See Appropriations Act, § 209(j), 111 Stat. 2483. The Department's effort to prepare to conduct the census with or without sampling has significantly complicated its planning activities. The Department of Commerce has informed the Solicitor General that, in its professional judgment, if the current uncertainty regarding the use of sampling in the 2000 census continues beyond March 1999, its ability to conduct the most accurate census possible will be seriously threatened. The Department of Commerce has also informed the Solicitor General that the longer it takes to resolve that question, the more difficult it will be to reach that goal.

There is consequently a strong public interest in prompt review by this Court of the district court's decision. Accordingly, the parties jointly move to expedite consideration of the jurisdictional statement and to establish an expedited schedule for briefing and argument if probable jurisdiction is noted. During each of the past two Terms, the Court has granted a similar motion of the parties for expedited consideration of the jurisdictional statement and for an expedited briefing schedule under a statute (the Line Item Veto Act) that contained a similar



expedited judicial review provision. See Clinton v. City of New York, 118 S. Ct. 1123 (1998); Raines v. Byrd, 117 S. Ct. 1489 (1997). See also United States v. Eichman, 494 U.S. 1063, 496 U.S. 310, 313 & n.2 (1990) (granting motion to expedite consideration of jurisdictional statements and setting expedited briefing and argument schedule for appeal under statutory provision for expedited direct appeal under Flag Protection Act).

We respectfully propose that the Court adopt one of the two alternative schedules set out at pages 2-3, above: (1) opening briefs on the merits for the appellants and the intervenor-defendants to be filed on October 6, 1998; the appellee's brief on the merits to be filed on November 3, 1998; reply briefs for appellants and intervenor-defendants to be filed on November 17, 1998; and oral argument to be held on November 30, 1998; or (2) opening briefs on the merits for the appellants and the intervenor-defendants to be filed on October 1, 1998; the appellee's brief on the merits to be filed on October 29, 1998; reply briefs for appellants and intervenor-defendants to be filed on November 9, 1998; and oral argument to be held on November 16, 1998. Counsel for the four groups of intervenor-defendants, who are deemed parties in this Court under Rule 18.2 of the Rules of this Court, agree to the proposal set forth above.

Respectfully submitted.

MAUREEN E. MAHONEY  
Counsel for Appellee  
United States House  
of Representatives

SEPTEMBER 1998

*Seth P. Waxman*  
 SETH P. WAXMAN  
Solicitor General

**In the Supreme Court of the United States**

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF  
COMMERCE, ET AL., APPELLANTS

v.

UNITED STATES HOUSE OF  
REPRESENTATIVES, ET AL.

ON APPEAL FROM THE UNITED STATES  
DISTRICT FOR THE DISTRICT OF COLUMBIA

**JOINT APPENDIX**

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

CIVIL DOCKET No. 98-CV-456

UNITED STATES HOUSE OF  
REPRESENTATIVES, PLAINTIFF

*v.*

THE UNITED STATES DEPARTMENT OF  
COMMERCE, ET AL., DEFENDANTS AND  
CITY OF LOS ANGELES, ET AL.,  
PROPOSED INTERVENOR-DEFENDANTS

---

TYPE E APPEAL

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Filed: 02/20/98

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Assigned to: Judge Royce C. Lamberth

Judge Ricardo M. Urbina

Circuit Judge Douglas H. Ginsbu

Demand: \$0,000

Nature of Suit: 890

Lead Docket: None

Jurisdiction: US Plaintiff

Dkt# in other court: None

Cause: 30:1276 Interior: Review of Agency Action

Case type: 1. civil 2. null

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DOCKET ENTRIES

---

DATE		PROCEEDINGS
2/20/98	1	COMPLAINT filed by plaintiff U.S. HOUSE OF REPRESENTATIVES (st) [Entry date 02/24/98]  * * * * *
2/20/98	2	MOTION (APPLICATION) filed by plaintiff U.S. HOUSE OF REP. for Three-Judge Court (st) [Entry date 02/24/98]
2/24/98	3	ORDER by Judge Royce C. Lamberth: granting motion for Three-Judge Court [2-1] by U.S. HOUSE OF REP. (N) (emh) [Entry date 02/25/98]
3/2/98	4	COPY of Order filed in USCA dated 2/24/98, by Chief Judge Edwards designating Circuit Judge Merrick B. Garland and District Judge Ricardo M. Urbina to serve with District Judge Royce C. Lamberth to hear and determine this case. (gt)
3/2/98	—	CASE ASSIGNED to Three Judge Panel consisting of District Judge Royce C. Lamberth, Circuit Judge Merrick B. Garland and District Judge Ricardo M. Urbina. (gt)
3/4/98	5	MOTION filed by plaintiff U.S. HOUSE OF REP. to expedite this action (st) [Entry date 03/06/98]

\* \* \* \* \*

3/27/98 11 MOTION filed by intervenor-deft. RICHARD A. GEPHARDT, intervenor-deft. DANNY K. DAVIS, intervenor-deft. JUANITA MILLENDER-MCDONALD, intervenor-deft. LUCILLE ROYBAL-ALLARD, intervenor-deft. LOUISE M. SLAUGHTER, intervenor-deft. BENNIE G. THOMPSON for to intervene as defendants EXHIBIT (answer) (st) [Entry date 03/30/98]

\* \* \* \* \*

4/1/98 13 MOTION filed for LEGISLATURE OF CA, CALIFORNIA SENATE, JOHN CHARLES BURTON, THE CALIFORNIA ASSEM, ANTONIO VILLARAIGOSA to intervene in this case as defendants EXHIBIT (motion to dismiss) (bjs) [Entry date 04/02/98]

\* \* \* \* \*

4/3/98 17 MOTION filed by intervenor-deft. CITY OF LOS ANGELES, intervenor-deft. CITY OF NEW YORK, intervenor-deft. COUNTY OF LOS ANGELES, intervenor-deft. CITY OF CHICAGO, intervenor-deft. CITY AND COUNTY OF, intervenor-deft. MIAMI-DADE COUNTY, intervenor-deft. CITY OF INGLEWOOD, intervenor-deft. CITY OF HOUSTON, intervenor-deft. CITY OF SAN ANTONIO, intervenor-deft. CITY AND



COUNTY, intervenor-deft. CITY OF LONG BEACH, intervenor-deft. CITY OF SAN JOSE, CA, intervenor-deft. CITY OF STAMFORD, intervenor-deft. CITY OF OAKLAND/CA, intervenor-deft. CITY OF OAKLAND/CA, intervenor-deft. CITY OF CUDAHY, intervenor-deft. CITY OF SANTA CLARA, intervenor-deft. COUNTY OF SAN BERNAD, intervenor-deft. COUNTY OF ALAMEDA, intervenor-deft. COUNTY OF RIVERSIDE, intervenor-deft. STATE OF NEW MEXICO, intervenor-deft. U.S. CONFERENCE, intervenor-deft. LEAGUE OF WOMEN, intervenor-deft. CAROLYN MALONEY, intervenor-deft. CHRISTOPER SHAYS, intervenor-deft. TOM SAWYER, intervenor-deft. ROD BLAGOJEVICH, intervenor-deft. BOBBY RUSH, intervenor-deft. LUIS GUITIERREZ, intervenor-deft. JOHN CONYERS JR, intervenor-deft. JOSE-SERRANO, intervenor-deft. CYNTHIA MCKINNEY, intervenor-deft. CHARLES-RANGEL, intervenor-deft. DONALD-PAYNE, intervenor-deft. HOWARD BERMAN, intervenor-deft. XAVIER BECCERA, intervenor-deft. LORETTA SANCHEZ, intervenor-deft. JULIAN DIXON, intervenor-deft. HENRY WAXMAN, intervenor-deft. MAXINE WATERS, intervenor-deft. ESTEBAN-TORRES, intervenor-deft. SHEILA JACKSON LEE to intervene as defendants EXHIBIT (proposed answer)

(st) [Entry date 04/07/98] [Edit date 04/07/98]

\* \* \* \* \*

- 4/6/98 19 MOTION filed by plaintiff U.S. HOUSE OF REP. for summary judgment (st) [Entry date 04/07/98]
- 4/6/98 20 MOTION filed by federal defendant DOC, federal defendant WILLIAM M. DALEY, federal defendant BUREAU OF THE CENSUS, federal defendant JAMES F. HOLMES to dismiss complaint [1-1] (st) [Entry date 04/07/98]
- 4/6/98 21 MOTION filed by intervenor-deft. RICHARD A. GEPHARDT, intervenor-deft. DANNY K. DAVIS, intervenor-deft. JUANITA MILLENDER-MCDONALD, intervenor-deft. LUCILLE ROYBAL-ALLARD, intervenor-deft. LOUISE M. SLAUGHTER, intervenor-deft. BENNIE G. THOMPSON to dismiss complaint [1-1] pursuant to Rule 12(b)(6)c) (st) [Entry date 04/07/98]

\* \* \* \* \*

- 4/13/98 26 MOTION filed by intervenor-deft. NATL KOREAN AMER, intervenor-deft. ORG OF CHINESE AMER, intervenor-deft. SEARCH TO INVOLVE, intervenor-deft. UNITED CAMBODIAN, intervenor-deft. LEAGUE/UNITED LATIN, intervenor-deft. CA LEAGUE/UNITED, intervenor-

deft. NATL ASSOC LATINO, intervenor-deft. MOTHERS OF EAST LOS, intervenor-deft. HEE-SOOK KIM, intervenor-deft. MICHAEL BALAOING, intervenor-deft. SOVANN TITH, intervenor-deft. JOHNNY M. RODRIGUEZ, intervenor-deft. CHAYO- ZALDIVAR, intervenor-deft. GILBERTO FLORES, intervenor-deft. ALVIN PARRA for to intervene EXHIBTI (PROPOSED ANSWER) (st) [Entry date 04/14/98] [Edit date 04/14/98]

\* \* \* \* \*

4/21/98 35 COPY of Order filed in USCA dated 4/10/98, by Chief Judge Harry T Edwards, that Circuit Judge Douglas H. Ginsburg is hereby designated to serve in lieu of Circuit Judge Merrick B. Garland to serve with District Judge Royce C. Lamberth and District Judge Ricardo M. Urbina to hear and determine this case. referencing , . (gt)

\* \* \* \* \*

5/4/98 45 MEMORANDUM by federal defendant DOC, federal defendant WILLIAM M. DALEY, federal defendant BUREAU OF THE CENSUS, federal defendant JAMES F. HOLMES in opposition to motion for summary judgment [19-1] by U.S. HOUSE OF REP. (st) [Entry date 05/05/98]

\* \* \* \* \*

5/4/98 51 MEMORANDUM by movant LEGISLATURE OF CA, movant CALIFORNIA SENATE, movant JOHN CHARLES BURTON, movant THE CALIFORNIA ASSEM, movant ANTONIO VILLARAIGOSA in opposition to motion for summary judgment [19-1] by U.S. HOUSE OF REP. (st) [Entry date 05/05/98]

5/4/98 52 RESPONSE by plaintiff U.S. HOUSE OF REP. in opposition to motion to dismiss complaint [1-1] [20-1] by federal defendant . (st) [Entry date 05/05/98]

5/4/98 53 MEMORANDUM by intervenor-deft. RICHARD A. GEPHARDT, intervenor-deft. DANNY K. DAVIS, intervenor-deft. JUANITA MILLENDER-MCDONALD, intervenor-deft. LUCILLE ROYBAL-ALLARD, intervenor-deft. LOUISE M. SLAUGHTER, intervenor-deft. BENNIE G. THOMPSON in opposition to motion for summary judgment [19-1] by U.S. HOUSE OF REP. (st) [Entry date 05/05/98]

\* \* \* \* \*

5/4/98 57 MEMORANDUM by intervenor-deft., movant, intervenor-deft., movant, intervenor-deft., movant, intervenor-deft., movant in opposition to motion for sum-



mary judgment [19-1] by U.S. HOUSE OF REP. (st) [Entry date 05/12/98]

5/5/98 55 RESPONSE by intervenor-deft. RICHARD A. GEPHARDT, intervenor-deft. DANNY K. DAVIS, intervenor-deft. JUANITA MILLENDER-MCDONALD, intervenor-deft. LUCILLE ROYBAL-ALLARD, intervenor-deft. LOUISE M. SLAUGHTER, intervenor-deft. BENNIE G. THOMPSON to motion for summary judgment [19-1] by U.S. HOUSE OF REP. (st) [Entry date 05/07/98]

\* \* \* \* \*

5/22/98 64 MOTION (APPLICATION) filed by movants City of Los Angeles, et al to join and joinder in the motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (st) [Entry date 05/26/98]

5/22/98 65 REPLY by movant RICHARD A. GEPHARDT, movant DANNY K. DAVIS, movant JUANITA MILLENDER-MCDONALD, movant LUCILLE ROYBAL-ALLARD, movant LOUISE M. SLAUGHTER, movant BENNIE G. THOMPSON to response to motion to dismiss complaint [1-1] pursuant to Rule 12(b)(6)c [21-1] by movant (st) [Entry date 05/26/98]

5/22/98 66 REPLY by plaintiff U.S. HOUSE OF REP. to response to motion for summary

judgment [19-1] by U.S. HOUSE OF REP.; exhibits (3) (st) [Entry date 05/26/98]

\* \* \* \* \*

5/22/98 67 REPLY by federal defendant DOC, federal defendant WILLIAM M. DALEY, federal defendant BUREAU OF THE CENSUS, federal defendant JAMES F. HOLMES to response to motion to dismiss complaint [1-1] [20-1] by federal defendant; exhibit (1) (bulky) (st) [Entry date 05/26/98]

6/10/98 78 NOTICE OF SUPPLEMENTAL AUTHORITY by plaintiff U.S. HOUSE OF REP. (st) [Entry date 06/11/98]

\* \* \* \* \*

6/11/98 — MOTION HEARING before Judges Douglas H. Ginsburg, Royce C. Lamberth, and Ricardo M. Urbina taken under advisement by movant motion to dismiss complaint [1-1] pursuant to Rule 12(b)(6)c [21-1], taken under advisement by federal defendant motion to dismiss complaint [1-1] [20-1], taken under advisement by U.S. HOUSE OF REP. motion for summary judgment [19-1] Reporter: Theresa Sorensen (emh) [Entry date 08/24/98]

\* \* \* \* \*

- 8/24/98 90 MEMORANDUM OPINION by Judges Royce C. Lamberth, Douglas H. Ginsburg, and Ricardo M. Urbina. (N) (emh)
- 8/24/98 91 ORDER by Judges Royce C. Lamberth, Douglas H. Ginsburg and Ricardo M. Urbina: denying motion to dismiss complaint [1-1] pursuant to Rule 12(b)(6)c [21-1] by movant, denying motion to dismiss complaint [1-1] [20-1] by federal defendant, granting motion for summary judgment [19-1] by U.S. HOUSE OF REP. and entering summary judgment for plaintiff; permanently enjoining defendants from using any form of statistical sampling. (N) (emh)
- 8/25/98 92 NOTICE OF APPEAL by federal defendant DOC to the U.S. Supreme Court from order [91-1], entered on: 8/24/98 (st) [Entry date 08/26/98] [Edit date 09/01/98]
- 8/28/98 93 NOTICE OF APPEAL by movant LEGISLATURE OF CA, movant CALIFORNIA SENATE, movant JOHN CHARLES BURTON, movant THE CALIFORNIA ASSEM, movant ANTONIO VILLARAI-GOSA to the U.S. Supreme Court from order [91-1], entered on: 8/24/98 (st) [Entry date 08/31/98] [Edit date 09/01/98]
- 8/28/98 94 NOTICE OF APPEAL by movant NATL KOREAN AMER, movant ORG OF CHINESE AMER, movant SEARCH TO INVOLVE, movant UNITED CAMBODIAN, movant LEAGUE/UNITED LA-

- TIN, movant CA LEAGUE/UNITED, movant NATL ASSOC LATINO, movant MOTHERS OF EAST LOS, movant HEE-SOOK KIM, movant MICHAEL BALAOING, intervenor-deft. CHAYO ZALDIVAR, movant ALVIN PARRA from order [91-1] to the U.S. Supreme Court, entered on: 8/24/98. (st) [Entry date 09/01/98] [Edit date 09/01/98]
- 8/31/98 95 NOTICE OF APPEAL by movant CITY OF LOS ANGELES, movant CITY OF NEW YORK, movant COUNTY OF LOS ANGELE, movant CITY OF CHICAGO, movant CITY AND COUNTY OF, movant MIAMI-DADE COUNTY, movant CITY OF INGLEWOOD, movant CITY OF HOUSTON, movant CITY OF SAN ANTONIO, movant CITY OF SAN JOSE, CA, movant CITY OF STAMFORD, movant CITY OF OAKLAND/CA, movant CITY OF CUDAHY, movant CITY OF SANTA CLARA, intervenor-deft. COUNTY OF SAN BERNAD, movant COUNTY OF ALAMEDA, movant COUNTY OF RIVERSIDE, movant STATE OF NEW MEXICO, movant U.S. CONFERENCE, movant LEAGUE OF WOMEN, intervenor-deft. CAROLYN MALONEY, movant CHRISTOPER SHAYS, movant TOM SAWYER, movant ROD BLAGOJEVICH, movant BOBBY RUSH, movant LUIS GUITIERREZ, movant JOHN CONYERS JR, movant JOSE SERRANO, movant CYNTHIA



MCKINNEY, movant CHARLES RANGEL, intervenor-deft. DONALD PAYNE, movant HOWARD BERMAN, movant XAVIER BECCERA, movant LORETTA SANCHEZ, movant JULIAN DIXON, movant HENRY WAXMAN, movant MAXINE WATERS, movant ESTEBAN TORRES, movant SHEILA JACKSON LEE from order [91-1], entered on: 8/24/98. to the U.S Supreme Court (st) [Entry date 09/01/98]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

CASE No. 1:98-CV-00456

UNITED STATES HOUSE  
OF REPRESENTATIVES,  
WASHINGTON, D.C. 20515, PLAINTIFF

*v.*

THE UNITED STATES DEPARTMENT  
OF COMMERCE; AND WILLIAM M. DALEY,  
IN HIS CAPACITY AS SECRETARY OF THE UNITED  
STATES DEPARTMENT OF COMMERCE  
14TH & CONSTITUTION AVENUES, N.W.  
WASHINGTON, D.C. 20230

AND

BUREAU OF THE CENSUS, AN AGENCY WITHIN  
THE UNITED STATES DEPARTMENT OF COMMERCE; AND  
JAMES F. HOLMES, IN HIS CAPACITY AS ACTING  
DIRECTOR OF THE BUREAU OF THE CENSUS, ROOM 2049,  
BUILDING 3 WASHINGTON, D.C. 20233-0100, —  
DEFENDANTS

---

[02/20/98]

---

**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

For 200 years, the government officials who have taken the decennial census for the purpose of legislative apportionment have conducted an actual enumeration

of the populace, by attempting to count all the people, in accordance with the mandates of the Constitution and Congress. Defendants now seek to abandon that course. Defendants have adopted a program for conducting the 2000 census that has no precedent in our Nation's history. Defendants do not plan to count every person who may be found. Instead, Defendants plan to use population estimates based upon statistical methods commonly referred to as "sampling" for the apportionment of the House of Representatives. Congress has determined that Defendants' plan poses such serious risks to the people and the political institutions of this Country that it adopted legislation, which the President signed, authorizing either House of Congress to seek immediate declaratory and injunctive relief in this Court. The House of Representatives brings this action pursuant to that specific authorization, and respectfully requests this Court to enjoin Defendants from using sampling to determine the population for the purpose of apportionment, and to declare that such use of sampling is unlawful because the Constitution and the Census Act, 13 U.S.C. § 195, forbid it.

#### **PARTIES**

1. Plaintiff United States House of Representatives is directly affected and aggrieved by Defendants' unlawful decision to use sampling in connection with the 2000 census to determine the population for the purpose of apportionment. Suit by the House to challenge this use of sampling is specifically authorized by § 209 of the Department of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act, 1988, P.L. 105-119, 111 Stat. 2440 (Nov. 26, 1997) (the "1998 Appropriations Act"). This suit has been

commenced at the direction of Newt Gingrich, Speaker of the House of Representatives, pursuant to § 209(g) of the 1998 Appropriations Act.

2. Defendant United States Department of Commerce is a department within the executive branch of the United States and an agency of the United States.

3. Defendant William M. Daley is the Secretary of Commerce. He is a defendant solely in his official capacity.

4. Defendant Bureau of the Census is an agency within the Commerce Department.

5. Defendant James F. Holmes is the Acting Director of the Bureau of the Census. He is a defendant solely in his official capacity.

#### **JURISDICTION AND VENUE**

6. This action arises out of Defendants' adoption of a program to use sampling in the 2000 census to determine the population of the United States for the purpose of apportioning Members of the House of Representatives among the several States. Defendants' program violates Article I, § 2, cl. 3, and Section 2 of the Fourteenth Amendment to the United States Constitution, as well as the Census Act. The Court has jurisdiction of this action pursuant to § 209 of the 1998 Appropriations Act and 28 U.S.C. § 1331.

7. Plaintiff seeks declaratory, injunctive, and other appropriate relief under § 209(b) of the 1997 Act.

8. Plaintiff is entitled to have this action heard and determined by a three-judge district court pursuant to § 209(e)(1) of the 1998 Appropriations Act.



9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

### **STATEMENT OF FACTS**

10. Section 2 of the Fourteenth Amendment to the United States Constitution provides that Members of the House of Representatives are to be "apportioned among the several States according to their respective numbers."

11. Pursuant to Article I of the Constitution, the population of the United States is determined for the purpose of the apportionment of Representatives by means of a decennial census. U.S. Const., Art. I, § 2, cl. 3. Although the decennial census and other periodic censuses are and historically have been used to collect a great deal of information that is used for various purposes, the sole constitutional purpose of the decennial census is to enable the apportionment of Representatives among the several States.

12. Article I of the Constitution requires that the decennial census be an "actual Enumeration" of the population. U.S. Const., Art. I, § 2, cl. 3.

13. The Fourteenth Amendment to the Constitution requires that Representatives be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const., Amend. XIV, § 2.

14. The Constitution entrusts Congress with a mandatory duty to conduct the census. Congress is required to "direct by law" the "Manner" in which the census is conducted, and the Constitution further requires that the census be taken "within every . . . Term of ten years." U.S. Const., Art. I, § 2, cl. 3.

15. Pursuant to Art. I, § 2, cl. 3 of the Constitution, Congress has directed the Secretary of Commerce (the "Secretary") and the Bureau of the Census, an agency within the Department of Commerce, to conduct the census. 13 U.S.C. §§ 2, 4, 21, 141(a). Congress expressly prohibited the Department of Commerce from using sampling to determine the population for the purpose of apportionment. The Census Act provides that, "[e]xcept for the determination of population for purposes of apportionment, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. § 195 (emphasis added).

16. The Census Act provides further that the decennial census is to be a determination of the population as of the first day of April of the year in which the census is taken. 13 U.S.C. § 141(a). The Secretary is required within nine months thereafter—i.e., no later than December 31—to tabulate the "total population by States . . . as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141(b).

17. After receiving the Secretary's report, the President is required to "transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives." 2 U.S.C. § 2a(a). The President's statement to Congress historically has incorporated, without modification, the figures reported to him by the Secretary.

18. Upon Congress's receipt of the statement required by 2 U.S.C. § 2a(a), the Clerk of the House of

Representatives is required to "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. § 2a(b).

19. Each State that is entitled to more than one Representative, based upon the certificate transmitted to it by the Clerk of the House of Representatives, must then "establish congressional districts equal in number to the number of Representatives to which it is entitled." 2 U.S.C. § 2c. Representatives "may only be elected from districts so established." *Id.*

20. The constitutional requirement that the decennial census must, for the purpose of apportionment, be an "actual Enumeration" of the population derived by "counting the whole number of persons in each State" precludes the use of sampling to estimate the population. The use of sampling to estimate the population for the purpose of apportionment is also prohibited by the Census Act, 13 U.S.C. § 195.

21. There have been 21 decennial censuses. The first was taken in 1790. In the early days, obtaining an accurate count was difficult, because the population was thinly spread over vast amounts of territory, much of which was unsettled, even hostile. Transportation was slow and often hazardous. Later censuses were handicapped by the civil strife leading up to and including the Civil War and Reconstruction. Massive waves of immigration and internal migrations have at times made the task particularly burdensome. Notwithstanding these and other difficulties, until now, the executive branch officials to whom Congress has entrusted the critical responsibility of obtaining a valid and lawful enumeration of the population for the purpose of apportionment have always established a

program designed to count the entire population. These officials have never before set out to estimate the population through sampling.

22. Before and after the most recent amendment to 13 U.S.C. § 195, in 1976, the Department of Commerce and the Bureau of the Census interpreted the Census Act and the Constitution to prohibit the use of sampling to determine the population for the purpose of apportionment.

23. On June 12, 1997, concerned by indications that Defendants intended to use sampling in lieu of an actual enumeration in the 2000 census, Congress enacted a statute that required the Department of Commerce to provide Congress with a comprehensive written report detailing the Department's plans for the 2000 census, including any use of sampling. 1997 Emergency Supplemental Appropriations Act for Recovery from National Disasters, Pub. L. No. 105-18, 111 Stat. 158, 217 (1997).

24. In July 1997, the Department issued its REPORT TO CONGRESS—THE PLAN FOR CENSUS 2000 (the "Census 2000 Report"). The Census 2000 Report states unequivocally that Defendants' plan includes the use of sampling to determine the population of the United States in the 2000 census for the purpose of apportioning Members of the House of Representatives among the several States. Pursuant to this plan, Defendants will, *inter alia*, (1) use a methodology they refer to as "sampling for nonresponse follow-up," under which Defendants will make a traditional headcount of the people in what they believe to be 90 percent of U.S. households and estimate the number of people in the remaining households; and (2) use a methodology they refer to as "Integrated Coverage Measurement," under



which Defendants will change the census numbers based upon a later, random sample of housing units, employing classifications based, *inter alia*, on race, ethnicity, gender, and age.

25. In July 1997, the Department of Commerce published its *Census 2000 Operational Plan*, which further confirms Defendants' adoption of a program to use sampling in the 2000 decennial census to determine the population of the United States for the purpose of apportionment.

26. On November 26, 1997, President Clinton signed the 1998 Appropriations Act into law. In § 209(a) of the 1998 Appropriations Act, Congress made the following findings:

- (1) it is the constitutional duty of the Congress to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and laws of the United States;
- (2) the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States;
- (3) section 2 of the 14th article of amendment to the Constitution clearly states that Representatives are to be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State";
- (4) article I, section 2, clause 3 of the Constitution clearly requires an "actual Enumeration" of the population, and section 195 of title 13, United States Code, clearly provides "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several

States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title.";

- (5) the decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs;
- (6) it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States;
- (7) the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census;
- (8) the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted; and
- (9) Congress is committed to providing the level of funding that is required to perform the entire range of constitutional census activities, with a particular emphasis on accurately enumerating all individuals who have historically been undercounted, and toward this end, Congress expects —
  - (A) aggressive and innovative promotion and outreach campaigns in hard-to-count communities;

- (B) the hiring of enumerators from within those communities;
- (C) continued cooperation with local government on address list development; and
- (D) maximized census employment opportunities for individuals seeking to make the transition from welfare to work.

27. Section 209(b) of the 1998 Appropriations Act provides that “[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.” For these purposes, the 1998 Appropriations Act includes among aggrieved persons “(1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action; (2) any Representative or Senator in Congress; and (3) either House of Congress.” *Id.* at § 209(d).

28. The 1998 Appropriations Act provides that, for purposes of § 209, the Census 2000 Report and the Census 2000 Operational Plan “shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding.” § 209(c)(2).

29. The use of sampling to determine the population for the purpose of apportionment is prohibited by the

Constitution, which requires that an “actual Enumeration” be obtained by “counting the whole number of persons in each State.” The use of sampling to determine the population for the purpose of apportionment is also prohibited by the Census Act, enacted by Congress pursuant to its constitutional duty by law to “direct” the manner in which the decennial census is taken.

30. Because Defendants do not plan to make an actual count of the population, there will be no way to gauge after the fact what the result would have been if the census had been taken by the traditional headcount method. Indeed, Defendants have intentionally designed the 2000 census to be a “one-number” census in an effort to prevent any judicial review or post-census remedy. It is highly likely, however, that the use of sampling will alter the result of the census in a manner that affects constitutional reapportionment.

31. The House of Representatives has an important stake in this controversy because the procedures used to conduct the census directly affect the composition of its membership, and because the Constitution vests Congress with the obligation to conduct an “actual Enumeration” of the population every 10 years and to direct the manner in which the census is taken. Defendants’ actions will cause direct and concrete injuries to legally cognizable interests of the House that are redressable through the relief sought in this action.

32. Defendants’ adoption of a procedure that uses sampling will cause concrete harm by depriving the House of Representatives of the important institutional protections afforded by the constitutional and statutory mandate that an actual count be obtained. The use of sampling creates a substantial risk or likelihood, *inter alia*, (1) that the composition of the House will not



conform to the requirements of the Constitution and laws in the next decade; (2) that there will be a successful legal challenge to the apportionment that could disrupt the House's operations as a body; (3) that the public will not have confidence in census numbers derived from estimates, which will undermine public respect for the House; and (4) that the census numbers could be politically manipulated to alter the composition of the House.

33. Defendants' adoption of a procedure that uses sampling will also cause concrete harm to the House of Representatives by preventing it from fulfilling the constitutional and statutory duty imposed upon Congress to conduct the census and ensure that the House can be timely apportioned in accordance with law. Defendants' decision to abandon the traditional and required method for conducting the census will prevent the House from receiving the population numbers it must have to perform its mandate to effectuate the lawful reapportionment of the House. This suit is necessary, and specifically authorized by law, to vindicate the special authority of Congress to direct the manner in which the census is taken, and to prevent Defendants from undermining that authority by disregarding congressional direction.

34. Defendants' adoption of a procedure that uses sampling may cause a conflict between (1) the statutory duty of the Clerk of the House of Representatives (as an officer of the House subject to its direction and control) to transmit to the States the President's statement showing the "whole number of persons in each State" and the number of Representatives to which each State is entitled, and (2) the constitutional duty of the House to ensure that the census and

ensuing reapportionment is conducted in accordance with the Constitution and laws of the United States. In the absence of injunctive or declaratory relief from this Court, the House may be forced to violate one of these legal duties.

35. Congress recognized the particularized interest of the House of Representatives in ensuring a valid and constitutional decennial census by providing in § 209(d) of the 1998 Appropriations Act that the House is a party aggrieved by the use of any statistical method in violation of the Constitution or laws of the United States to determine the population for the purpose of apportionment, with a right to seek in a civil action declaratory, injunctive, or other appropriate relief against the use of such method.

36. As the Congress found in § 209(a)(8) of the 1998 Appropriations Act, "the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted."

37. Recognizing that there is a substantial public interest in insuring through a prompt and final declaration of rights that the population determination resulting from the 2000 census—which is projected to cost nearly \$4 billion—will lawfully form the basis for apportionment over the course of the ensuing decade, Congress provided for expedited litigation of this matter. See 1998 Appropriations Act, § 209(e).

COUNT ONE

38. Plaintiff United States House of Representatives repeats and realleges the allegations of paragraphs 1 through 37 of the complaint.

39. Defendants have adopted a program for the 2000 census that uses sampling, *inter alia*, for nonresponse follow-up and Integrated Coverage Measurement, in lieu of relying upon an actual count of the people of the United States, to determine the population for the purpose of apportioning Members of the House of Representatives among the several States.

40. The use of sampling in the decennial census to determine the population for the purpose of apportioning Members of the House of Representatives among the several States violates the Constitution and the Census Act.

41. The House of Representatives is aggrieved by Defendants' program to use sampling in the 2000 decennial census in violation of the Constitution and laws of the United States. Defendants' actions will cause direct and concrete injuries to legally cognizable interests of the House that are redressable through the relief sought in this action.

42. Newt Gingrich, the Speaker of the House of Representatives, has directed the commencement of this suit by the House of Representatives, in accordance with § 209(g) of the 1998 Appropriations Act.

43. The issuance of declaratory and injunctive relief is necessary to prevent irreparable injury to the House of Representatives.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff United States House of Representatives prays that:

a. The Court convene a three-judge panel to hear and determine this case pursuant to § 209(e)(1) of the 1998 Appropriations Act;

b. The Court declare that Defendants' use of sampling for nonresponse follow-up, for Integrated Coverage Measurement, or in any other way, in the 2000 census to determine the population for the purpose of apportioning Representatives among the several States would violate Article I, § 2, cl. 3, and Section 2 of the Fourteenth Amendment to the United States Constitution;

c. The Court declare that Defendants' use of sampling for nonresponse follow-up, for Integrated Coverage Measurement, or in any other way, in the 2000 census to determine the population for the purpose of apportioning Representatives among the several States would violate the Census Act, 13 U.S.C. §§ 1 *et seq.*;

d. The Court permanently enjoin Defendants from using sampling for nonresponse follow-up, for Integrated Coverage Measurement, or in any other way, in the 2000 census to determine the population for the purpose of apportioning Representatives among the several States; and



e. The Court award to Plaintiff such additional and further relief as the Court deems appropriate.

Respectfully submitted this 20th day of February, 1998,

/s/ MAUREEN E. MAHONEY  
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## United States Department of Commerce

Bureau of the Census

### STATUS REPORT ON PLANNING FOR A DECENNIAL CENSUS IN YEAR 2000 WITHOUT THE USE OF SCIENTIFIC SAMPLING

AS OF APRIL 1998

\* \* \* \* \*

### VIII. PLANNING SCHEDULE FOR ALTERNATIVE PLAN FOR CENSUS IN 2000

Integral to the Census Bureau's work to develop a detailed plan for an alternative plan census by December 1998 is formulating a budget for the remaining years of the 2000 census cycle, and completing an Operational Plan incorporating all activities in the revised plan. Until the Bureau has selected and defined new or expanded components and performed the operational analyses needed to determine their staffing, equipment, and timing requirements, meaningful cost estimates and time lines for activities cannot be provided.

With few exceptions, virtually every census activity in the current design for 2000 is subject to modification for the non-sampling census design. Costs of only a few large pre-and post-census operations (compilation of the initial Master Address File, associated geographic services, and dissemination of final results) are unlikely to change. Virtually all other operations—whether they are adaptations of activities conducted in 1990, or have been developed as part of planning the sampling design, or would be newly defined—require reexamination under the non-sampling plan. They may have greater work loads with increased staffing, timing, and equipment or supply requirements; they may introduce work flow modifications with implications for schedule and personnel resources; and they may entail major redesign of forms or other materials. Furthermore, it is not sufficient to define requirements for each individual component; relationships within the full set of components must be determined to assure

that time and cost estimates reflect an efficient work-flow and use of resources. For example:

- It would likely be necessary to restructure the entire set of operations during the critical period between the delivery of census questionnaires and the beginning of nonresponse follow up. If, for instance, the Census Bureau decides to do a second, targeted mailing of the census questionnaire, that time period would be lengthened and additional census forms would be required. If, in addition, they introduce an early enumeration of units identified as vacant by the USPS, both changes must be incorporated into a revised schedule supported by appropriate levels of staff resources.
- Because all nonresponding addresses would be visited, the follow up period must be expanded, additional questionnaires and other supplies must be produced, and the work load for data capture would be increased. The Census Bureau would have to examine the new work flow to determine if peak processing periods would require additional automated equipment and staffing.
- Many operations targeted at improving coverage would require new forms and procedures. First and foremost, those operations which depend on information on the census questionnaire imply revisions to the questionnaire's format and potential changes in size. Also, new telephone or field follow up operations—for example, if administrative records are used to identify persons potentially missing from the census—would require new forms, interviewer training and procedures, and supervisory requirements.



- New requirements for matching and unduplication activities may include expanding the search area and preparing materials for telephone or field verification in some cases. The implications of these new requirements, which may require schedule changes, additional clerical support, or the like, would be examined before associating time lines and costs with the operation.

Nov 1997	Funding of FY 1998 approved, including requirements to develop traditional plan by March 1999.
April 1998	Present status report on planning for an alternative design
May - Oct 1998	Assess effectiveness and costs of major elements of alternative plan, while working with Congress to clarify its willingness to spend substantial additional funds to reduce inaccuracy
Oct 1998	Open 130 Local Census Offices and begin training and preparing office staff to implement the plan
Dec 1998	Provide results from the dress rehearsals
Jan 1999	Provide analysis of the dress rehearsals
March 1999	Act on final decision on scientific sampling in Census 2000.

\* \* \* \* \*

(ORDER LIST: 524 U.S.)

THURSDAY, SEPTEMBER 10, 1998

APPEAL—JURISDICTION NOTED

98-404 DEPARTMENT OF COMMERCE, ET AL. V.  
UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

The motion of the parties to expedite consideration and to expedite the briefing schedule is granted. In this case probable jurisdiction is noted. The briefs of the appellants and intervenor-defendants are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, October 6, 1998. The briefs of appellees are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 3, 1998. The reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 17, 1998. Rule 29.2 does not apply. Oral argument is set for Monday, November 30, 1998.

United States Department of Commerce  
Bureau of the Census

REPORT TO CONGRESS—  
THE PLAN FOR CENSUS 2000

Originally Issued  
July 1997

Revised and Reissued  
August 1997

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**Glossary of Terms**

**This Report was required by Title VIII of P.L. 105-18. For ease of reference, readers can find the following specifically-requested items in the following locations:**

<u>Item</u>	<u>Report Section</u>
"a list of all statistical methodologies that may be used in conducting the Census"	II(B); IV; V
"an explanation of these statistical methodologies"	II(B); IV; V
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"an estimate of the error rate at the census block level based upon the 1995 test data"	VIII(F)



## EXECUTIVE SUMMARY

This "Report to Congress—The Plan for Census 2000" responds to Congress' direction that the Department of Commerce provide it with a comprehensive and detailed plan for Census 2000, including methodologies, types and size of statistical errors, cost estimates, options for counting hard-to-enumerate individuals without statistical sampling, and error rates at the census block level in the 1995 test.

The Census Bureau's goal in Census 2000 is to take the most accurate and cost-effective census possible. The importance of an accurate decennial census cannot be overstated. Census data are used to reapportion the House of Representatives, ensuring that political representation is distributed evenly to all Americans, and to determine allocation formulas for the distribution of billions of dollars of federal and state funds each year. Census data tell us what we know about our country; they are the definitive benchmark for virtually all demographic information used by educators, policy makers, journalists, and community and nonprofit organizations.

The national census count became more accurate with each consecutive census from 1940 to 1980. Although it surpassed all previous censuses in terms of design, execution and resources used, the 1990 census took a large step backwards in terms of accuracy. While the 1980 census had fallen 2.8 million people below an accurate count, the census count in 1990 fell 4.7 million people short, missing 1.8 percent of the population, according to demographic analysis estimates.

Moreover, the undercount in 1990 was not spread evenly across the nation; children and minorities were disproportionately undercounted.

In the wake of the 1990 census, there was a consensus among the Census Bureau, professional statisticians, and Congress that significant changes were required for the upcoming 2000 census; the Census Bureau could not continue to employ the methods it had been using. In 1991, bipartisan legislation passed unanimously by Congress and signed by President Bush directed the National Academy of Sciences (the Academy) to study "the means by which the Government could achieve the most accurate population count possible."

Changes in American society dictate that census-taking methods must change. The willingness of many Americans to respond to the decennial census has declined in recent years. Populations with high undercount rates under traditional methods of enumeration have grown more rapidly than the total population. The necessity of adapting census methodologies in response to societal changes was discussed by the Academy Panel to Evaluate Alternative Census Methodologies in its second interim report in June 1997: "[c]hange is not the enemy of an accurate and useful census; rather, not changing methods as the United States changes would inevitably result in a seriously degraded census."

Census 2000 will incorporate many changes. It will incorporate a Master Address File that is more comprehensive than ever. It will use a public outreach and marketing campaign to educate people about the importance of being counted. It will utilize a more effective questionnaire mailout and mailback cam-

paign—the foundation of the census. It will incorporate advanced technologies to increase accuracy and speed. It will utilize statistical sampling to account for those who cannot otherwise be accounted for. And it will incorporate quality assurance plans to ensure an accurate one-number census. The details of the plan for Census 2000 are contained in this Report.

The Academy recommended that the Census Bureau consider “the appropriateness of using sampling methods in combination with basic data-collection techniques.” As detailed in this Report, several Academy panels have examined the census process over the past six years and all have concluded that an accurate and cost-effective census cannot be taken without the introduction of a limited use of sampling. The Academy Panel on Census Requirements in the Year 2000 and Beyond concluded that,

[i]t is fruitless to continue trying to count every last person with traditional census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 census using traditional methods, as it has in previous censuses, will not lead to improved coverage or data quality.

The Plan for Census 2000 results directly from the 1991 legislation and the subsequent guidelines and recommendations of the Academy. All significant departures from the methodologies used in previous censuses have been endorsed by the Academy, the Bureau’s advisory committees, and the scientific community.

The Plan for Census 2000 has received strong support from professional statisticians and demographers—experts are convinced that the introduction of a limited

use of scientific sampling in Census 2000 will result in a more accurate, less costly census. These experts also believe that the use of sampling in Census 2000 should minimize the opportunity for political manipulation, not increase it. Scientists understand that sampling has known, objective properties that are preferable to the certainty of missing several million individuals using traditional enumeration methods alone. They understand that uncontrolled error is more of a concern with a traditional headcount than with sampling.

Outreach efforts, like the City of Milwaukee’s Complete Count Campaign in 1990, increase awareness and mail response rates, but do not solve the census accuracy problem. The alternative to introducing a limited use of sampling is to continue with traditional physical enumeration methods. Taking Census 2000 the same way that the 1990 census was taken would result in an expected undercount of at least 1.9 percent of the population (more than 5 million people), and would cost at least \$675 million more than the current plan. Increased outreach will not solve the problem; spending more money for less accuracy is not a feasible alternative.

To further ensure accuracy and to avoid, even the appearance of possible manipulation of the census, the Census Bureau has made plans for Census 2000 to incorporate an unprecedented expert review process. The Census Bureau has proposed that the Academy convene another expert panel to guide the Bureau’s work through the completion of Census 2000. This new group will review critically the statistical procedures for Census 2000, especially the use of statistical sampling. The new group will work closely with the statisticians and demographers at the Census Bureau



through the entire census operation. Census 2000 will be conducted in the open, in full public view.

As requested, this Report details expected error rates for Census 2000 down to the census tract level. If Census 2000 is conducted using a traditional enumeration, without the introduction of sampling, the Census Bureau expects an average error rate of at least 1.9 percent at all levels of geography from the census tract level up to the national level. In contrast, the Census Bureau's plan for Census 2000, a plan involving the introduction of a limited use of sampling, has the following expected average error rates: 0.1 percent at the national level, 0.5 percent at the state level, 0.6 percent at the Congressional district level, and 1.1 percent at the tract level.

The Report also discusses error rates at the census block level. The 1995 Census Test did not provide meaningful error rates at the block level. The block error rates measured in the 1995 Census Test reflect two facts, that the test had lower rates of sampling than will be used in Census 2000, and that some blocks had few people. Even traditional methods of enumeration have seemingly high block level error rates: the 1990 Census had an average block error rate of almost eight percent. Fortunately, with or without sampling, such substantial error at the census block level does not mean substantial inaccuracy when blocks are aggregated. At all geographic levels important to political representation and funds allocation, Census 2000 will provide more accurate results than physical enumeration alone.

The Census Bureau is confident that its plan for Census 2000 satisfies both the Census Act and the Constitution.

The Department of Justice (DOJ) in 1994 specifically approved the Census Bureau's plan to use sampling in Census 2000, a position consistent with earlier DOJ opinions in prior administrations, both Democratic and Republican. Courts have interpreted the Constitutional requirement of an "actual Enumeration" as a command to take the most accurate census feasible. Due to changes in American society, the most accurate census feasible can no longer be taken by traditional physical enumeration methods alone. The introduction of a limited use of sampling is necessary for an accurate and cost-effective census in 2000.

## I. IMPORTANCE OF AN ACCURATE CENSUS

The Constitution commands that a census of the nation's population be taken every ten years. The constitutional purpose for the census is the apportionment of seats in Congress, but the information collected every ten years provides more than just state-by-state population totals. The decennial census provides the cornerstone of knowledge about the people of our nation.

State and local governments use census data to draw legislative districts of equal population to comply with the constitutional "one man, one vote" mandate, and to comply with the statutory requirements of the Voting Rights Act. Each year the Federal government distributes billions of dollars in grants according to population-based formulas based on census data. Federal, tribal, state and local officials study the patterns of detailed census data before constructing hospitals, highways, bridges and schools. Private businesses large and small have come to depend on the Census Bureau's population, income, education and housing data to locate new offices, shops and factories, and to market new products. Census data also serve as definitive benchmarks for virtually every household survey by educators, policy-making agencies, and community and nonprofit organizations.

### A. A Tradition of Innovation in the Census

The first census was taken in 1790 by United States Marshals, who were directed to visit every dwelling place and count the individuals living there. Since that time, the census has evolved to accommodate societal

changes and to use advances in technology and statistics.

- The nation's population grew faster than the number of U.S. Marshals. Over time, professional enumerators supplemented the work of Marshals and completely replaced them by the end of the 19th century.

- After spending eight years tallying by hand the results of the 1880 Census, Census Bureau employees invented the punch card machine.

- In 1940, the Census Bureau introduced its "short form" questionnaire for the majority of the population, using the "long form" set of questions for only a sample of the population. Prior censuses had asked all residents to answer all questions.

- In 1970, the Census Bureau introduced self enumeration by mail. Rather than send an enumerator to every household in the nation, the Census Bureau first mailed questionnaires for households to fill out and mail back, and then sent enumerators only to nonresponding addresses.

The basic structure for census data collection (mailout/mailback followed by enumerator visits to all nonresponding addresses) did not change from 1970 through 1990. The results of the 1990 Census, however, demonstrated that new methods are required.

### B. Lessons From the 1990 Census

1. **Overview.** The 1990 Census was a difficult undertaking. Though better designed and executed than any previous census, the Census in 1990 took a



step backward on the fundamental issue of accuracy. For the first time since the Census Bureau began conducting post-census evaluations in 1940, the decennial census was *less* accurate than its predecessor. In spite of unprecedented efforts to count everyone, accuracy in the 1990 Census fell short of the accuracy achieved in the 1980 Census. On the basis of "Demographic Analysis,"<sup>1</sup> the undercount was 4.7 million people; the undercount rate of 1.8 percent in 1990 was 50 percent greater than the rate had been in 1980.

(Net Undercount Based on Demographic Analysis,  
1940-1990 - Chart Omitted)

**2. Some Groups Counted Less Effectively Than Others.** To measure the extent to which identifiable groups were not fully counted, the Census Bureau conducted a Post Enumeration Survey (PES)<sup>2</sup> as part of the 1990 Census process. The PES found large differences in the undercount rates for different groups, a phenomenon called the "differential undercount."

*Children were much more likely than adults to be undercounted in the 1990 Census.* While children

<sup>1</sup> Demographic Analysis is one of the two standard methods that the Census Bureau uses to measure coverage, that is the extent that the official census totals cover or completely account for the true total. Demographic Analysis relies on administrative records of births, deaths, immigration, and emigration to provide estimates of the true total. Demographic Analysis is the only method for analyzing historical trends in the shortfall in coverage, the national undercount.

<sup>2</sup> The PES evaluated coverage on a case-by-case basis using the Dual System Estimation methodology explained in Section V (F). The PES provided undercount information for detailed categories, such as renter/homeowner and racial and ethnic group, that are not possible with demographic analysis.

under the age of 18 represented 26 percent of the total national population that year, they accounted for 52 percent of the undercount.

(Children's Share - Chart Omitted)

*Renters, particularly in rural areas, were also more likely to be left out of the official Census count in 1990.* The PES found a 5.9 percent undercount among renters in rural areas.

(Undercount of Homeowners and Renters - Chart Omitted)

*Racial and ethnic minorities were also affected disproportionately.* Compared to the undercount rate for non-Hispanic Whites, the 1990 undercount rates were six times larger among African Americans and seven times larger among Hispanics. Twelve percent, or nearly one out of every eight, American Indians living on reservations were not counted in 1990.

(Estimated 1990 Census Net Undercount Percent - Chart Omitted)

**3. Effects of Inaccuracy.** As a result of the inaccuracy in the 1990 Census, many Americans were denied an equal voice in their government.—Federal spending employing population-based formulas—for schools, crime prevention, health care, and transportation—was misdirected.

**4. An Exhaustive Attempt to Make Traditional Methods Work.** The 1990 Census failed to match the accuracy of the 1980 Census despite the Census Bureau's exhaustive attempt to make traditional methods work. The Census Bureau deployed more than a half million people around the country to collect

information from the approximately 36 million addresses that had not responded by mail. The Bureau devoted considerable effort and resources on operations to improve the count in areas with the greatest risk of a large undercount:

- Four advisory committees helped develop and implement specialized outreach efforts to racial and ethnic minority groups.
- To promote awareness about the census and its importance, the Census Bureau invested \$75 million in promotion and outreach activities, and worked with the Advertising Council on a public service announcement campaign valued at \$68 million.
- Toll free telephone numbers were created so that people who had questions about how to fill out the forms could get assistance or request a Spanish-language form.

**5. Resources Were Adequate.** The deterioration in accuracy of the census from 1980 to 1990 cannot be attributed to inadequate funding by Congress. The Census Bureau requested, and received, additional appropriations from Congress. The 1990 Census was the most expensive in history, costing \$25 per housing unit. On an inflation adjusted basis, the 1970 Census had cost only \$11 per housing unit, and the 1980 Census \$20 per housing unit.

(Rising Census Cost - Chart Omitted)

**6. Causes of Inaccuracy and the Undercount.** How did such a comprehensive effort result in the first count known to be *less* accurate than its predecessor? Experts at the Census Bureau and three National

Academy of Sciences (Academy) panels commissioned to study the problem concluded that the lower accuracy and higher costs of the 1990 Census were the product of several troubling societal trends:

- An increasing number of Americans were too busy to be counted. The number of people working more than one job had increased, along with the number of multiple-worker families, so people were home less often when enumerators visited. When people were home, they were less willing to spend time filling out a census form.
- Americans were inundated with junk mail, mail that obscures important documents such as census forms.
- More Americans lived in housing that was remote or inaccessible. For example, security guards in gated communities did not always cooperate with enumerators.
- More Americans were becoming alienated from society in general and more mistrustful of government in particular. They had also grown more concerned about privacy.

These experts also concluded that the population of people more likely to be left uncounted has been growing more rapidly than the total population. Census tracts with high undercount rates tend to have the following characteristics to a greater degree than the rest of the country:

- A highly mobile population.
- Language barriers.



- High concentrations of unmarried residents.
- Nontraditional housing arrangements, such as extended families, cohabiting couples, roommates, boarders and other nonrelatives.
- Irregular housing, such as illegal units, mobile homes and secured buildings.
- Neighborhood conditions that lead to resistance to outsiders, concealment to protect resources, and disbelief of census confidentiality.

Because higher proportions of the nation's children, renters, and minorities live in these situations, it should not be surprising that their undercount rates are higher.

The sharp decline in the rate that people return their census questionnaires presents a clear example of how the changes in society directly affect the operation of the census. When census questionnaires were first mailed in 1970, 78 percent of housing units mailed back their questionnaires. By 1990, that percentage had fallen to 65 percent.

Every indication since 1990 suggests that the census-taking environment is likely to be even more difficult in 2000 than it was in 1990. For example, the percentage of married couple families with both spouses employed rose steadily from 28 percent in the 1960 Census to 50 percent in the 1990 Census. That trend has continued upward in the 1990s.

### C. A Consensus to Improve Census Accuracy

Congress, concerned about the accuracy and cost problems of the 1990 Census, passed the Decennial Census Improvement Act of 1991 (P.L. 102-135), signed by President Bush, requiring the National Academy of Sciences to study "the means by which the Government could achieve the most accurate population count possible," specifically considering, *inter alia*, "the appropriateness of using sampling methods in combination with basic data-collection techniques or otherwise, in the acquisition or refinement of population data, including a review of the accuracy of the data for different levels of geography . . ." The legislation enjoyed bipartisan support: the House of Representatives passed it unanimously and the Senate passed it under a suspension of the rules by unanimous consent.

### D. Recommendations of National Academy of Sciences' Panels

Since 1990, the Academy's Committee on National Statistics has established three separate panels to study how to improve the next decennial census: the Panel on Census Requirements in the Year 2000 and Beyond ("Academy Panel on Requirements"), the Panel to Evaluate Alternative Census Methods ("Academy Panel on Methods"), and the Academy Panel to Evaluate Alternative Census Methodologies ("Academy Panel on Alternative Methodologies").<sup>3</sup>

<sup>3</sup> The Academy Panel on Requirements was tasked with considering the purposes of a decennial census and alternative data collection systems. This panel supplemented an existing panel, the Academy Panel on Methods that had been tasked with studying

The Academy Panel on Requirements found that traditional methods were incapable of eliminating the undercount:

It is fruitless to continue trying to count every last person with traditional Census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 Census using traditional methods, as it has in previous Censuses, will not lead to improved coverage or data quality.

It also found that more radical alternatives to a traditional enumeration (a national register, an administrative records census, a census conducted by the U.S. Postal Service, and a rolling sample census) were either not feasible or not consistent with American values.

Finally, the Academy Panel on Requirements found that scientific sampling, both for nonresponse follow-up and to improve accuracy (each is described in Section V) would both increase accuracy and lower costs. That panel concluded that scientific sampling was not just *a* solution to the cost and accuracy problems, it was the *only* solution.

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how the census should be taken and that focused on more specific methodologies. The Academy Panel on Requirements issued an interim report in May, 1993 and its final report, "Modernizing the U.S. Census," in 1995. The Academy Panel on Methods issued a "Letter" report in December, 1992, an interim report in September, 1993, and its final report, "Counting People in the Information Age," in the fall of 1994. Subsequently, the Academy created its Academy Panel on Alternative Methodologies, which has issued two interim reports: "Sampling in the 2000 Census: Interim Report I," in June, 1996, and "Preparing for the 2000 Census: Interim Report II," in June, 1997.

The report from the Academy Panel on Methods concurred with the Academy Panel on Requirements that statistical sampling should be used both for non-response follow-up and to increase accuracy:

Differential undercount cannot be reduced to acceptable levels at acceptable costs without the use of integrated coverage measurement and the statistical methods associated with it. We endorse the use of integrated coverage measurement as an essential part of Census-taking in the 2000 Census . . . Sampling for nonresponse follow-up could produce major cost savings in 2000. The Census Bureau should test nonresponse follow-up sampling in 1995 . . .

The Second Interim Report from the Academy Panel on Alternative Census Methodologies likewise concluded that census methods need to change in response to societal changes:

Changing, updating, and adapting the Census methods is a proven and desirable course of action. Change is not the enemy of an accurate and useful Census; rather, not changing methods as the United States changes would inevitably result in a seriously degraded Census.

Thus, the current plan for Census 2000 results from Congressional legislation, enacted in the aftermath of the 1990 Census, that directed the Census Bureau to achieve greater accuracy by revising census methodology in accordance with recommendations formulated by the National Academy of Sciences.



## II. THE CENSUS 2000 PLAN

Census 2000 will be the largest peacetime mobilization in our nation's history. Its goal is to ensure that every individual in the United States on April 1, 2000 is accounted for.

### A. Public and Congressional Involvement in Census 2000 Planning

1. **The Advisory Committees.** To ensure public involvement in the plan for Census 2000, the Bureau chartered a number of advisory committees under the Federal Advisory Committee Act, 5 U.S.C. § App. I, to assist in planning.

- **The 2000 Census Advisory Committee** consists of more than 30 professional, governmental, and nongovernmental organizations, such as the American Sociological Association, the Business Roundtable, the National Association of Counties, the National Governors' Association, the U.S. Chamber of Commerce, and the National Coalition for the Homeless. All Congressional oversight committees and subcommittees have had *ex officio* members on this Advisory Committee. The Committee advises the Secretary of Commerce about designing Census 2000 methodologies and procedures, reducing the differentials among population groups and geographic areas, and containing costs.

- **The Census Advisory Committee of Professional Associations** consists of the American Statistical Association, the Population Association of America, the American Economic Association, and the American Marketing Association. The Committee advises the Census Bureau on the full

range of Census Bureau programs and activities in relation to its areas of expertise.

- **Four Census Advisory Committees on Particular Racial and Ethnic Populations** have been created: the **Census Advisory Committee on the African American Population**; the **Census Advisory Committee on the American Indian and Alaska Native Populations**; the **Census Advisory Committee on the Asian and Pacific Islander Populations**; and the **Census Advisory Committee on the Hispanic Population**. These four Committees provide the Census Bureau with an organized and continuing channel of communication with the communities they represent. They have helped the Census Bureau refine plans for nonresponse follow-up sampling, the paid advertising campaign, community-based outreach programs, and other matters critical to reaching all segments of the nation's population.

2. **Public Meetings.** To ensure even wider participation in the planning process, the Census Bureau has convened public meetings in thirty-one cities across the country over the past three years to solicit input on the plan for Census 2000.

3. **Congressional Partnership.** In recognition of the Congress' particular interest in the decennial census, the Department of Commerce and the Census Bureau have strived to keep Congress informed about plans for improving Census 2000. Since the inception of the Secretary's 2000 Census Advisory Committee, the Chairman and ranking member of the House and Senate authorizing and appropriations committees and subcommittees have served as *ex officio* members of the Committee. Census Bureau staff cooperated with

the Congress to develop P.L. 103-430, the Census Address List Improvement Act of 1994, that will enable effective partnerships with local and tribal governments, as well as with the U.S. Postal Service (USPS).

Since 1991, Department of Commerce officials have accepted 18 invitations to testify before House and Senate authorizing committees. In addition, officials have accepted invitations to testify before the House Appropriations Committee and the Senate Appropriations Committee. In the past two years, officials have responded to nearly 100 Congressional letters and more than 75 telephone requests inquiring about the plan for Census 2000. During that same period, the Census Bureau's Director and other Department of Commerce officials have held more than 100 briefings for Members and their staff on the plan for Census 2000.

#### **B. Major Components of the Plan**

The Census Bureau's detailed plan for Census 2000 is set forth in "The Census 2000 Operational Plan", a copy of which is appended to this report. The highlights of the plan are explained below and in Sections IV and V.

**1. The Master Address File.** To conduct the census, the Census Bureau must identify and locate an estimated 118 million housing units in the nation. It plans to accomplish this goal by developing and maintaining a Master Address File (MAF) that is more comprehensive than ever before. For more detail on the MAF, see Section IV(A).

**2. Public Outreach and Marketing.** In 1990, the Bureau spent approximately \$75 million on promotion and outreach. It also supported a Public Service Announcement (PSA) effort that resulted in the airing of approximately \$68 million worth of donated adver-

tisements. In spite of these efforts, the mail response rate dropped 10 percentage points and, according to Demographic Analysis, the net undercount was almost 2 million people higher than in the 1980 Census.

Part of this drop was caused by the Census Bureau's inability to ensure that PSAs were broadcast at optimum times and in appropriate markets. An evaluation of the 1990 PSA campaign by an outside contractor noted that ads were seldom placed at optimal times because decisions about when to air PSAs rested with local radio or television stations. Sixty percent of the U.S. population received 91 percent of the census advertising impact; forty percent received only 9 percent.

Post-census analysis found that outreach and publicity appeared to improve response and seemed as successful or more successful in 1990 than in 1980. However, the 1990 Outreach Evaluation Survey also revealed that outreach was less successful among Blacks than among non-Hispanic Whites or Hispanics.

Based on its study of prior outreach campaigns, the Bureau concluded that the professional control of a paid media campaign would produce the best results. As former Director of the Census Bureau, Dr. Barbara Bryant (1989-1993) noted, "[t]he time for dependence upon pro bono creative work on Public Service Announcements for air time was past by 1990. The Census Bureau depended upon these for one census too many."

Census 2000 will launch a \$208 million public out-reach campaign to educate everyone about the importance of



being counted. Among the improvements in public outreach and marketing are:

Targeted community outreach. In 2000, the Census Bureau will build partnerships with local and tribal governments, businesses, and community groups to get the word out, to endorse the census, and to encourage constituents to respond. Beginning in 1996 and expanding in 1998, government and community specialists will be hired to build relationships with local community and service-based organizations— focussing on groups representing traditionally undercounted populations. An extensive outreach program is planned to reach schools, public sector employees, American Indians, and religious organizations. Businesses, non-profit groups, and labor organizations will also be asked to endorse participation and to publicize the census through employee newsletters, inserts with paychecks, and through communications with members and local chapters.

Direct mail. The census questionnaire and related materials delivered to individual addresses will carry the same themes and messages as the overall campaign.

Public relations. The Bureau will use public meetings and the news media to inform the public about the value of the census and to encourage response. Communications specialists will be assigned to each field office to perform media outreach, to respond to media inquiries, and to coordinate the dissemination of Census 2000 messages. Local broadcaster/news director committees will be established in many communities to emphasize Census 2000 to TV viewers and radio listeners through broadcast segments and editorials in newspapers.

Advertising. The Census Bureau plans a targeted campaign to reach everyone through ads in newspapers, magazines, billboards, posters, radio, and television. A qualified private advertising firm will be retained to design and implement the Census 2000 advertising campaign at a projected cost of approximately \$100 million, primarily for buying media time.

**3. Questionnaire Mailout/Mailback.** In Census 2000, the questionnaire mailout/mailback system will be the primary means of census-taking, as it has been since 1970. The short form will be delivered to approximately 83 percent of all housing units. The short form asks only the basic population and housing questions, while the long form will include additional questions on the characteristics of each person and of the housing unit. The long form will be delivered to a sample of approximately 17 percent of all housing units.

USPS letter carriers will deliver questionnaires to the vast majority of housing units that have city-style addresses (*e.g.*, 123 Main Street, Anytown, USA). In areas where there is no USPS delivery to city-style addresses, enumerators will hand-deliver addressed census questionnaires to each housing unit. In very remote or sparsely populated areas, enumerators will visit each housing unit and pick up or complete unaddressed questionnaires that the USPS previously delivered to each unit.

Because the American public is now deluged with junk mail, the Census Bureau has developed a questionnaire for 2000 that is easy to read, pleasing to look at, and simple to fill out. Private marketing experts are working with the Bureau to develop user-friendly designs that will help people understand why they are

being asked for information. Sections IV(B) and IV(C) details innovations in the data collection process.

**4. Collecting Data on Populations Living In Non-traditional Households.** Taking a decennial census does not involve counting people just living in houses and apartments. In Census 2000, the Census Bureau must also enumerate people who live in group quarters and other nontraditional housing units, as well as people with no usual residence. These units include nursing homes, group homes, college dormitories, migrant and seasonal farm worker camps, military barracks or installations, American Indian reservations, and remote areas in Alaska.

Some of the enumeration methods that will be used for these special populations are:

- The Census Bureau has designed an operation for Census 2000 called Service-Based Enumeration (SBE) to improve the count of individuals who might not be included through standard enumeration methods. The SBE operation will be conducted in selected service locations, such as shelters and soup kitchens, and at targeted outdoor locations.
- Another special operation will count highly transient individuals living at recreational vehicle campgrounds and parks, commercial or public campgrounds, marinas, and even workers' quarters at fairs and carnivals.
- The Census Bureau is working with tribal officials to select the appropriate data collection methodologies for American Indian reservations.

- Remote areas of Alaska, often accessible only by small airplanes, snowmobiles, four-wheel-drive vehicles, or dogsleds, will be enumerated beginning in mid-February. This special timing will permit travel to these areas while conditions are most favorable.

- The Bureau will work with the Department of Defense and the U.S. Coast Guard to count individuals living on military installations, and with the U.S. Maritime Administration to identify maritime vessels for enumeration.

**5. Collecting Long Form Data to Meet Federal Requirements.** The census is the only data-gathering effort that collects the same information from enough people to get comparable data for every geographic area in the United States. The long form has been used on a sample basis since 1940 to collect more data, more rapidly, while reducing overall respondent burden. In 2000, the long form will ask questions addressing the same seven subjects that appear on the short form, plus an additional 27 subjects which are either specifically required by law to be included in the census or are required in order to implement other federal programs and the census is the only source of the data.

**6. Retrieving and Processing the Data from the Returned Forms.** The Census Bureau has contracted with the private sector to secure the best available data capture technology. This technology will allow the Census Bureau to control, manage and process Census 2000 data more efficiently.

The Census 2000 data processing system will be a complex network of operational controls and processing routines intended to store and service the decennial



control and data requirements. The Bureau will record a full electronic image of every questionnaire; sort mail-return questionnaires automatically; use optical mark recognition for all check-box items; and use intelligent character recognition to capture write-in character-based data items. The system will allow the Bureau to reduce the logistical burdens associated with handling large volumes of paper questionnaires. Once forms are checked in, prepared and scanned, all subsequent operations will be accomplished using the electronic image and captured data.

**7. Matching and Unduplication.** Census 2000 will make it simpler for people to be counted by providing them with multiple opportunities, and multiple methods, to respond. These response options will make it easier for everyone to be counted, but will increase the possibility of multiple responses for a given person and/or household. Unduplication of multiple responses in past censuses would have required a massive clerical operation, since only a small subset of person names was data captured. Advances in computer technology in the areas of computer storage, retrieval, and matching, along with image capture and recognition, have now given the Census Bureau the flexibility to provide multiple response options without incurring undue risk to the accuracy of the resulting census data.

**8. Processing.** The electronic images and data will be edited by computerized routines, checked for completeness and consistency, and prepared for tabulation and release of totals. As part of this process, missing information will be imputed.

**9. Quality Assurance.** To detect, correct, and minimize performance errors in critical census operations, the

Census Bureau has developed individual quality assurance plans for all activities that could contribute to errors in outcome, such as misprinted census forms, inaccurate maps or address lists, faulty intelligent character recognition, inadequate training of enumerators, and mis-keyed entries. The Census Bureau has created Quality Assurance Plans for each significant activity in Census 2000. In most cases, the Census Bureau will perform back-up checks for each procedure. Errors will be corrected, and steps will be taken to prevent similar errors in the future.

**10. The Census 2000 Dress Rehearsal in 1998.** A good dress rehearsal is crucial to a successful Census 2000, and the key to any dress rehearsal is making it as much like the actual event as possible. The Census Bureau has selected three sites in which to conduct the Census 2000 Dress Rehearsal: Sacramento, California; Columbia, South Carolina, along with 11 surrounding counties in north central South Carolina; and the Menominee American Indian Reservation in northeastern Wisconsin. The Census Bureau believes these three sites will provide a good operational demonstration of Census 2000 procedures and systems.

Since the summer of 1996, the Census Bureau has been working closely with local officials and community-based organizations in each of the three sites to plan and build the various infrastructures needed to ensure a successful Dress Rehearsal. These joint activities include refining the geographic database, building and refining the address lists, and working with community and tribal organizations to plan effective outreach and promotion efforts. The Bureau has recruited staff in all

three sites to begin complete address list development and verification.

The Dress Rehearsal will allow for a thorough demonstration of the most critical procedures for Census 2000. These procedures include address list development, marketing and promotion, and data collection, processing, and tabulation. The Dress Rehearsal plan will also demonstrate the use of statistical sampling in four major census operations: nonresponse follow-up, housing units designated as undeliverable as addressed by the USPS, Integrated Coverage Measurement (ICM), and the long form survey (Discussed in more detail in Section V.)

**11. Data Dissemination through DADS.** The census provides a wealth of data that researchers, businesses, and government agencies are eager to research. Taking advantage of today's computer and Internet capabilities, the Census Bureau plans to make data from Census 2000 more readily available than any previous decennial census data. Census 2000 data will be tabulated and disseminated using the Data and Access Dissemination System (DADS). DADS will provide an interactive electronic system to allow data users to access prepackaged data products, documents, and on-line help, as well as to build custom data products on-line and off-line.

The Census Bureau has solicited the advice and recommendations of data users throughout the planning, design, and testing stages of DADS. DADS will be accessible to the widest possible array of users through the Internet and all available intermediaries, including the nearly 1,800 Data Centers and affiliates, the 1,400 Federal Depository libraries and other libraries,

universities, and private organizations. DADS will allow users to create customized products such as tables, charts, graphs and maps based on Census Bureau or user-defined geographic areas, and access metadata that provide documentation and explanatory information for data subjects and geographic areas.

**12. Evaluation and Preparation for 2010.** Once Census 2000 is completed, the Bureau will, as it has after all the censuses it has taken, conduct a variety of post-census evaluation studies. These studies will help data users, both within and outside the Census Bureau, to assess the data from Census 2000 and plan for the 2010 Census. In the past, these studies have relied on Demographic Analysis, statistical methods, and ethnographic analyses.

### III. SUMMARY OF COSTS AND IMPROVEMENTS

The following table provides the estimated costs of Census 2000, allocated among ten major activities and their components. The costs are expressed in constant dollars projected for year 2000.



CENSUS 2000 MAJOR ACTIVITIES: COST AND IMPROVEMENTS FROM 1990 CENSUS		
ACTIVITY	COST IN MILLIONS	IMPROVEMENTS FROM 1990 CENSUS
<b>Building the Address List</b>	\$286	For Census 2000, the 1990 address list is updated with the United States Postal Service list and local address lists to account for about 81 percent of all addresses. The census address list and the census geographic file are totally integrated for Census 2000, which will enable enumerators to locate housing units faster. All city-style addresses have corresponding streets in the census geographic file and non-city style address locations are added to the census geographic file in Census 2000. Census address listers visit only a small portion of city-style addresses for field validation (for the 81 percent of addresses referenced above.) Local jurisdictions will be encouraged to review and correct the address list. Maintaining a nationwide, continuously updated and increasingly accurate census address list linked to the census geographic file is critical to any census.
- Plan and conduct address validation operations in areas with city-style addresses	\$110	
- Plan and conduct address listing operations in areas with high concentration of non-city style addresses	\$132	
- Update and validate address list data	\$44	

Testing the Reengineered Methods	\$218	Testing the new sampling and estimation methods will occur prior to being incorporated into Census 2000 on a larger scale.  In addition to sampling for content (the "long form"), sampling and estimation will be used to 1) complete the nonresponse follow-up; and 2) produce a one-number census through Dual System Estimation. In Census 2000, the Bureau will use an automated matching system to ensure that each person is enumerated at his/her usual residence. This was largely a clerical operation in 1990.
- Questionnaire mailing tests	\$71	
1995 Census Test	\$37	
1996 Community Census	\$77	
National Content Survey	\$33	
Race and Ethnic Targeted Test		The field office structure will be more streamlined and focused on data collection functions; for example, all questionnaires will be returned directly to the data capture centers.  Data collection maps will be produced locally to better target enumerator activities.  Development of an automated enterprise-wide integrated personnel and payroll system to administratively support the Census 2000 temporary workforce will permit efficient employment and payroll processing. Use of PC-based client server architecture for the key automation systems will provide an effective, flexible processing capability.
- Conduct Census 2000 dress rehearsal		
- Sampling and estimation design		
- Research use of administrative records		
<b>Putting the Field Structure in Place</b>	\$621	
- Field geographic support	\$67	
of address listings, data collection and tabulation activities	\$112	
- Recruiting, training, and documentation preparation	\$171	
- Regional management of field offices, including space and support activities	\$142	
I.-equipment and telecommunications	\$129	

Reaching the Public/Marketing-	\$208	In Census 2000, the Census Bureau will use paid advertising by the "best in class" contractor versus <i>pro bono</i> advertising used in 1990.
-Design and operation of national advertising campaign	\$100	
-Partnership activities with state, local, and governments and national & umbrella organizations	\$108	
		The Census Bureau will have more targeted outreach efforts than in 1990 through the use of Government Specialists, Community Specialists, and Media Specialists.
		The Census Bureau will hire a "best in class" contractor to develop and distribute curriculum and promotional materials about Census 2000 to schools.
Printing and Mailing	\$419	For Census 2000, the Census Bureau has developed a new mailing treatment strategy (including an advance notice letter, first questionnaire, reminder/ thank you postcard, and replacement questionnaire) that has been shown to increase mail response.
Questionnaires-	\$145	
-Printing of initial and replacement questionnaires-	\$27	
-Printing of prenotice letter,	\$189	
reminder post card and other public use forms	\$58	
-Mailing of initial and reminder questionnaires		
-Mailing of advance notice letter, reminder post card and other public use forms		In areas with a high concentration of people speaking a language other than English, the Bureau will provide questionnaires in the appropriate language.
		For Census 2000, the Census Bureau has conducted extensive research and testing to develop user-friendly questionnaires that make self-response and participation in the census easier.

Data Collection, Including	\$1,408	The nonresponse follow-up operation in Census 2000 will incorporate the use of sampling to yield a 90 percent completion rate at the census tract level.
Nonresponse Follow-up-	\$1,114	
-Physical enumeration activities	\$294	
-ICM data collection		In Census 2000, data collected in the physical enumeration and data collected in the ICM are integrated to produce one-number census.
		Use of a service-based methodology to enumerate people with no usual residence in Census 2000.
Capturing Data from	\$533	Census 2000 data capture process will employ the latest commercially available electronic imaging technology i.e., taking an electronic photograph or "image" of each questionnaire and using the image to capture the data. The design, development, production, national deployment, and support of the entire data capture system has been contracted out to a single systems integrator.
Returned Forms and	\$29	
Telephone Interviews-	\$99	
-Data capture and processing oversight	\$48	
-Questionnaire receipt, check-in, editing, coding, and processing	\$232	
-Data capture center logistical activities	\$76	
-Processing system programming and support	\$49	
-Data capture system		
-Telephone questionnaire assistance and related activities		
Delivering Data Summaries to the Public-	\$166	Development of an electronic data access and dissemination system and development/ design of Census 2000 data products to meet user needs for faster and more access to timely census data. This replaces many of the electronic and paper products produced in 1990.
-Prepare, review and distribute census results-	\$137	
-Prepare and distribute geographic products	\$29	



<u>Evaluating the Results</u> -Collect and evaluate information for use in next census	\$52	The Census Bureau will investigate potential methods for enhancing efficiency and effectiveness of future census activities.
<u>Operations Management</u> -Managing the census	\$86	Matrix management teams will generate efficiencies and lower staff levels at headquarters in Census 2000.
<b>TOTAL</b>	<b>\$3,997</b>	

#### IV. IMPROVEMENTS OF TRADITIONAL METHODS IN CENSUS 2000

To ensure that Census 2000 will be both more accurate and more cost-effective than the 1990 Census, the Census Bureau has reviewed its procedures with input from a wide array of experts. The Bureau has asked these experts: Which parts of the process work best? Which can be done more effectively in some other way? Which can be eliminated? The result is an innovative departure from past practices that will substantially increase overall accuracy and address the differential undercount of children, renters, and minorities. At the same time, the new methods of enumeration will save money and deliver results more quickly. This chapter explains the improvements made to traditional census methods. Section V explains the improvements that involve scientific sampling.

##### A. The Master Address File

To conduct Census 2000, the Census Bureau must identify and locate an estimated 118 million housing units in the nation. The Bureau plans to accomplish this goal by developing and maintaining the Master Address File (MAF). This vital operation will take place with the assistance of the USPS, other federal agencies, tribal, state and local governments, community organizations, and by an intensive canvass of selected areas.

In 1990, whole housing units were missed often enough to contribute notably to the undercount problem. (See Section VIII (A)(1) for more detail.) Plans for Census 2000 are designed to address

weaknesses found in the 1990 address list. In 1990, the Census Bureau relied on address lists purchased from vendors. It found that the purchased address lists were less accurate in low income areas because the lists were originally generated for marketing purposes. Vendors tended to focus their attention on wealthier, and therefore more profitable, areas. The 1990 experience also demonstrated the need to identify more carefully housing units in advance and place them on geographical maps.

The MAF being prepared for Census 2000 should be superior to the 1990 address list. The MAF will start with the USPS address list, a list that does not discriminate against certain areas because of their marketing potential. Partnerships with state and local officials, community organizations, and tribal governments will also play an important role in making sure the MAF is accurate as the local officials who know the areas best will help develop the MAF. Finally, the method used to create the MAF in rural areas will be superior because of intensive efforts well in advance of the census.

City-Style Addresses. The USPS uses the term "city-style" for an address such as "123 Main Street," even though such an address occurs in small towns and increasingly along country roads. In areas where the USPS delivers mail primarily to city-style addresses, the Census Bureau will create the MAF by combining addresses from the 1990 Census Address Control File with those addresses in the USPS Delivery Sequence File (DSF). The DSF is a national file of individual delivery point addresses. As part of a cooperative agreement, the USPS provides the

Census Bureau with updated DSFs on a regular basis. The Bureau then locates these addresses in its computer mapping system called TIGER (Topologically Integrated Geographic Encoding and Referencing). If an address cannot be located, the location is researched and resolved through an office operation or through assistance from local partners. As a result of this research, the Bureau identifies new features and corrects and adds address ranges to the TIGER data base.

Non-city-Style Addresses. In late 1998 and early 1999, the Census Bureau will launch a comprehensive effort to canvass areas where most residences do not have city-style addresses. Over 30,000 canvassers will visit approximately 22 million residences without a street address to fix their locations on the TIGER system. The combination of innovative use of computer data and technology, along with these visits to areas without city-style addresses, will allow the Census Bureau to construct the most accurate address list ever, giving field enumerators more time to meet the other challenges presented by the 2000 count. The Bureau will conduct the initial data collection phase in these areas by having enumerators deliver addressed census questionnaires during an update/leave or an update/enumerate operation. Where there is no mailing address for the housing unit, or the mailing address is not a city-style address, the listing will include a location description.

The additional effort to identify and locate non-city-style addresses comes at a significant cost. City-style addresses are projected to cost \$1.40 per case



compared to \$6.00 per case for non-city-style addresses.

Remote Areas. In a few extremely remote and sparsely settled areas, census enumerators will create the address list at the time of the initial census data collection while canvassing their assignment area and picking up or completing unaddressed questionnaires that the USPS previously had delivered to each household. The completed address listings and their geographic locations will be captured at this time.

Nontraditional Living Quarters. A separate operation will build an inventory of all facilities that are not traditional living quarters, for example, prisons and hospitals. The Bureau will interview an official at each location using a Facility Questionnaire. The responses to the questionnaire will identify each group quarters and any housing units associated with the location. The Bureau will classify each group quarters and any housing units at the location according to whether they will be enumerated as part of special place enumeration or through regular enumeration. The Bureau will add those group quarters and housing units to the MAF and link them to the TIGER data base.

Local Government Partnerships. The Bureau will rely on local knowledge to build the MAF. State, local, and tribal governments, regional and metropolitan planning agencies, and related nongovernmental organizations are encouraged to submit locally developed and maintained city-style address lists to the Census Bureau to enhance the MAF. The participants will benefit by more complete and

accurate data for their area. The Census Bureau will match the local list both to the MAF and TIGER data base.

The Census Bureau will attempt to verify the status of each newly identified address through ongoing matches to updated address information from the USPS, other independent sources, and its own field operations. Addresses that are not found on the TIGER system will be researched and resolved.

The LUCA (Local Update of Census Addresses) program is a partnership that will allow local and tribal governments to designate a liaison to review the portion of the MAF that covers their jurisdiction to help ensure its completeness. LUCA participants will benefit by more complete and accurate data for their area. Prior to the Census and after the initial targeting operations or address listing have been completed, the Census Bureau will send the liaison a listing from the MAF and the accompanying maps for their jurisdiction. The liaison will review the addresses and provide the Census Bureau with updates (adds, deletes, and corrections). After processing the LUCA input, the Census Bureau will provide feedback on the status of the adds, deletes, and corrections to the liaison. The updated address list then will be used to deliver census questionnaires (either by mail or by an enumerator's visit).

#### **B. New Outreach Methods**

Several innovations are planned for outreach. Collectively, these new methods should increase response rates beyond those expected with the 1990 methodology.

**Multiple contacts.** For the first time ever, Census 2000 will implement a multiple mail contact strategy. Instead of mailing just one questionnaire, the Census Bureau will mail two waves of questionnaires, each preceded by a mailed notice/ reminder. This strategy has paid big dividends for the private sector and has proved effective in Census Bureau tests. The Census Bureau projects that a single mailing would result in further erosion of the response rate to 55 percent, but that its multiple notices and questionnaires will boost the response rate to 67 percent.

**More ways to respond.** In 1990, respondents had to find their form in the mail; in 2000, the forms will find respondents. The Bureau will make forms available in stores and malls, in civic or community centers, in schools, and other locations frequented by the public. A well-publicized toll-free telephone number will be available for those who wish to respond to the census by phone. In remote or sparsely-populated areas, enumerators will visit each housing unit and pick up or complete unaddressed short-form questionnaires and administer the long form at predesignated sample households.

**Multiple languages.** In 2000, as in all prior decennial censuses, questionnaires will be in English. For the first time in a decennial census, however, some households in Census 2000 will receive two questionnaires—one in English and one in another language. Specific neighborhoods known to have a high proportion of households more familiar with languages other than English will be sent questionnaires in their second language as well as a questionnaire in English. Forms in other languages will also be made

available in locations frequented by non-English speakers. The Census Bureau has made Spanish-language questionnaires available in the past, but questionnaires in languages other than English have never before been included in the initial mailout package.

### C. New Technology

The Census Bureau plans to introduce several new technologies in Census 2000:

**Unduplication.** Modern technology allows the Bureau to spot and eliminate multiple responses from the same household. One of the main goals of Census 2000 is to make it simpler for people to be counted by having census forms available in public locations, provided in multiple language translations, and mailed out twice in mailout/mailback areas. Responses to the census also will be accepted over the telephone and possibly on the Internet. Providing these response options will make it easier for everyone to be counted, but will increase the possibility of multiple responses for a given person and household. A complete, accurate address list, high speed data capture capabilities, along with automated matching technologies will be the keys to avoiding the duplication of people and residences. Unduplication of multiple responses was not feasible or necessary in past Censuses because available technology and costs permitted only a small subset of person names to be data captured and unduplicated.

**Data Retrieval Technology.** Through contracting with private vendors, the Census Bureau will utilize the best available data capture methodology in



Census 2000. The Bureau has successfully tested the hardware and software that converts handwriting on the questionnaire into computer form with minor editing by a technician. The plan for data capture will use off-the-shelf hardware and software to record a full electronic image of every questionnaire. It will sort mail-return questionnaires automatically to ensure timely conversion and capture of critical information needed prior to nonresponse follow-up. It will use Optical Mark Recognition (OMR) to capture all check-box items, Intelligent Character Recognition (ICR) and key-from-image to capture write-in character-based data items. The Bureau will also conduct quality assurance on all data capture activities. The system will reduce the logistical burdens associated with handling large volumes of paper questionnaires. Once original questionnaires are checked-in, prepared and scanned, all subsequent operations will be accomplished using the electronic image and captured data.

## V. USE OF SCIENTIFIC SAMPLING TO INCREASE ACCURACY

In our common experience, "sampling" occurs whenever the information on a portion of a population is used to infer information on the population as a whole. We use samples every day to characterize a larger group—for manufacturing quality checks, for medical tests, for determining air and water quality, and for conducting audits, to name a few. In laymen's terms, a "sample" is taken whenever the whole is represented by less than the whole. Among professional statisticians, the term "sample" is reserved for instances when the selection of the smaller population is based on the methodology of their science. The sampling proposed for Census 2000 is scientifically based; improves accuracy; eliminates the traditional undercount of children, renters and minorities; and saves money.

### A. Reliance on Sampling in Previous Censuses.

In the debate over methods to be used in Census 2000, **the issue is not whether to "sample" but whether to sample scientifically.** Census takers have never been able to contact and count each and every resident of this nation. As a result, information on less than the whole population has always been used to characterize the whole population.

Census 2000 will not be the first time that the Census Bureau has used statistical methods to correct for problems in physical enumeration and to provide a more accurate final result. Since at least 1940, statistical imputation has been used when an

enumerator knew that a housing unit was occupied, but could not obtain information on the number of people living in that unit. In 1980, statistical imputation raised the physical enumeration total by 761,000 people. The number and rate of people imputed in the 1990 Census was only 53,590. Automated data control systems and field procedures may have discouraged enumerators from turning in incomplete questionnaires. In 1970, the Census Bureau used sampling to impute people to addresses that had initially been assumed vacant. The sample of 13,546 housing units initially presumed "vacant" found that 11.4 percent of them should be reclassified as "occupied." The National Vacancy Check added 1,068,882 people, or 0.5 percent of the total, to the 1970 Census.

Apart from the population totals, the Bureau has historically used statistical methods extensively to make up for incomplete census information. For example, information is asked about each individual's age, sex and race. Established statistical methods were used to infer missing information.

In other efforts, the Bureau has used statistical methods to represent the whole population when less than complete responses are obtained. For example, the Census of Industries every five years makes an effort to contact every large company in specific industries. Some companies do not respond and statistical methods are used to account for them in the totals ultimately published.

## **B. Support for Sampling within the Scientific Community.**

The assumption underlying the traditional census method has been that the most accurate representation of the entire population would come from an intensive effort to physically contact every individual household. The experience of 1990 proved that this assumption was no longer valid and that to "pour more money into traditional methods" was not satisfactory. Because of changes in our society, a sample drawn by including only those physically contacted became markedly inaccurate. After 1990, a scientific consensus emerged that, while we should continue to pursue physical contact with every household to supply information, we should use the best statistical science to organize collection of information on those who fail to respond by mail or phone. In other words, the old system is no longer adequate in light of societal changes.

Census 2000 will use sampling in two new ways: (1) to follow up on housing units that do not respond by mail or phone; and (2) to use ICM to minimize the coverage error associated with past censuses. In addition, Census 2000 will sample housing units considered vacant by the USPS.

These methods have been endorsed by three Academy panels and by numerous other organizations:

- The American Statistical Association, a 157-year old group with more than 19,000 members nationwide, convened a "Blue Ribbon Panel" to assess the use of sampling in Census



2000. In its 1996 report, that panel "endorsed the use of sampling," concluding that it is "consistent with best statistical practice." It notes that "sampling is used widely in science, medicine, government, agriculture, and business because it is the fundamental basis for addressing specific questions in these areas. Sampling is a critical tool for reducing uncertainty." The report observed that "[s]pecific areas that use statistical sampling extensively include auditing, market research, quality assurance, approving new drugs, and medical testing . . . Sampling permits observations to be made efficiently, economically, and fairly."

- The American Sociological Association, founded in 1905, is a national professional society of 12,500 sociologists, research scientists, and others interested in research, teaching, and application of sociology. On January 25, 1997, the American Sociological Association unanimously approved a resolution supporting the use of sampling in the decennial Census. This resolution strongly urged "the Secretary of Commerce and Congress to support unequivocally the use of sampling for non-responding households and for reducing the differential undercount in the 2000 Census."

- The General Accounting Office also favors the use of sampling, stating that it is "encouraged that the Bureau has decided to sample those households failing to respond to Census questionnaires rather than conducting a 100-percent follow-up as it has in the past."

"Sampling households that fail to respond to questionnaires produces substantial cost savings and should improve final quality."

- The Inspector General of the Department of Commerce has repeatedly endorsed the plan to use sampling in Census 2000. Most recently, in a May 5, 1997 letter to Senator Stevens, Chairman of the Senate Committee on Appropriations, the Inspector General stated that, "[o]ver the past two years, we have issued reports, testified, and briefed bureau, departmental, and congressional principals and their staff members on our support for the use of statistical sampling in the 2000 Census. We continue to believe that, if carefully planned and implemented, sampling can be employed by the bureau in the 2000 Census to produce overall more accurate results than were produced in the 1990 Census, at an acceptable cost."

### C. Sampling to Collect Long Form Data

The Census Bureau has used sampling techniques since 1940 to collect some of the most important decennial census data. Prior to the institution of the short form the Census Bureau had asked detailed census questions of every resident. In fact, the Census Act mandates the use of sampling in the decennial census, *see*, 13 U.S.C. §§ 141, 195. As it has in the last six decennial censuses, the Census Bureau will deliver the long form questionnaire to a sample of housing units.

In 2000, the long form will ask the same 7 questions that appear on the short form, plus questions on an

additional 27 subjects that are either specifically required by law to be included in the census or are required to implement other federal programs and the decennial census is the only source of the data. Using sampling to collect long form information will enable the Census Bureau to meet the objectives of controlling cost and maintaining or reducing respondent burden.

The long form is a cost-effective tool for gathering information to evaluate and implement federal programs. Dozens of agencies depend on the long form for the information they need to run their programs, including the Department of Defense, the Federal Reserve, the National Center for Health Statistics, the Department of Labor and many more. The following are just a few examples of how long form data is used:

- Federal and local emergency management agencies use census data to assess the amount of displacement caused by earthquakes, hurricanes, floods and other natural disasters.
- Planners must have information about where people work, where they live, how they get to work, and when they leave for work to build roads, tunnels, and bridges in areas that need them.
- The Department of Veterans Affairs uses census data on age, veteran status, period of service, years of service, and residence five years ago to determine where hospitals, nursing homes, and other services should be located.

The Census Bureau will use a variable rate sampling scheme in Census 2000 to collect long form data. The variable rate sampling scheme for Census 2000 will probably be similar to the 1990 sampling scheme:

- The overall sampling rate will be about one in six, or 17 percent.
- The sampling rate in general purpose governmental units with populations fewer than 2,500 will be one in two. Designated American Indian and Alaska Native areas will also receive a one in two sample.
- The sampling rate in other governmental units will be one in six or one in eight.

Variable rate sampling will allow the Census Bureau to allocate the sample efficiently while reducing respondent burden and maintaining the accuracy and reliability of census data at small geographic levels (census tracts, and small communities).

#### **D. Sampling in the Postal Vacancy Check**

As noted in Section V(A), the Census Bureau used sampling in 1970 in response to concerns that too many housing units had been erroneously identified as vacant. The Census Bureau estimates that the USPS will identify about five percent of all housing units as vacant in 2000. In order to correct for anticipated errors in this designation, the Census Bureau will send interviewers to one out of every ten of the housing units that the USPS indicates are vacant. The number of housing units that are found to be occupied and the number of people living there



will be used to estimate the total population of units initially designated as vacant. Scientifically proven statistical methods will be used to account for the total population and the estimated number of occupied and vacant housing units in the postal vacant universe.

#### **E. Sampling for Nonresponse Follow-up**

In conducting Census 2000, the Census Bureau will rely mainly on mail returns of census questionnaires, as it has in every census since 1970. If every housing unit returned its form by mail, the Bureau would not need a nonresponse follow-up operation, but the mail response rate declined markedly from 78 percent in 1970 to 65 percent in 1990. The Census Bureau estimates that mail response in 2000 would fall to 55 percent with one mailing, but can be raised to 67 percent with its current plan for two waves of notices and questionnaires and other innovations. That will leave 34 million occupied housing units not expected to respond.

(Chart)

The Bureau will attempt to contact these nonresponding housing units in the nonresponse follow-up portion of Census 2000. The Bureau's plan for this operation includes a limited use of statistical sampling to assure that data are collected from at least 90 percent of the housing units in each census tract. (A census tract is a neighborhood with roughly 1,700 housing units and 4,000 people. Tracts are designed to have homogeneous population characteristics, economic status, and living conditions. There will be more than 60,000 census tracts in 2000.)

All questionnaires mailed back during the data collection period will be included in the enumeration process.

The most difficult logistical segment of Census 2000 becomes more manageable with a scientific sample of nonresponding housing units. Enumerators must visit 22.5 million housing units rather than the 34 million housing units they would need to visit without sampling. Reducing the number of housing units to be visited will allow the Census Bureau to hire fewer and better qualified enumerators. And the time and effort that would have been spent recruiting, screening, training and managing additional temporary employees can be spent on meeting the other challenges involved in Census 2000.

By reducing the burden on enumerators, sampling for nonresponse follow-up will help ensure that the ICM can begin on time. The longer the delay between Census Day and the ICM, the more respondents are likely to provide inconsistent responses (out of forgetfulness, or because of the continuous turnover in housing units—which affects approximately 150,000 housing units each month).

In its second Interim Report on June 10, 1997, the Academy's Panel on Alternative Methodologies commented on the benefits of sampling:

. . . [W]e do not believe that a Census of acceptable accuracy and cost is possible without the use of sampling procedures, both for non-

response follow-up and integrated coverage measurement . . . [T]he use of sampling will reduce the field workload and may result in more timely completion of the nonresponse follow-up procedures in the field.

#### Selecting the Sample for Nonresponse Follow-up.

The addresses that will be part of the nonresponse sample will be evenly distributed across all addresses in each census tract not returning forms by mail or answer by telephone. The Census Bureau will achieve this goal by using scientifically-proven techniques, including computer-generated random sampling, to make sure that every nonresponding address in each census tract has an equal chance of selection. Enumerators will be given a list of specific addresses of nonresponding housing units within a census tract as soon as the mail-in phase is complete. Because these addresses are part of a random sample, they will be statistically representative of all housing units in that nonresponding tract.

To obtain information from 90 percent of housing units in each census tract, those tracts with lower mail response rates will have a higher share of housing units sampled. For example, for census tracts in which 80 percent of addresses return their forms by mail, the enumerators will be assigned randomly-selected addresses that represent half of the addresses that did not respond. If only 70 percent of addresses return their forms, enumerators will be assigned two of every three addresses not responding. And if the response rate is lower, enumerators will contact an even greater share of nonresponding addresses—more than adequately

covering all segments of the Census tracts not responding.

RESPONSE RATE	SIZE OF SAMPLE	TOTAL DIRECT CONTACTS
30 percent	6 in 7	90 percent
40 percent	5 in 6	90 percent
50 percent	4 in 5	90 percent
60 percent	3 in 4	90 percent
70 percent	2 in 3	90 percent
80 percent	1 in 2	90 percent
90 percent or more	1 in 10	91 percent

Note: The Census Bureau is reviewing the June 1997 recommendation of the Academy panel to increase the sample for tracts with high response rates.

Interviewing by Temporary Field Staff. The non-response follow-up operation is the largest single operation in Census 2000. In order to follow up with housing units not returning questionnaires in the mail, the Census Bureau will recruit, hire, train and supervise a massive temporary field staff. Since virtually every urban and rural community and neighborhood has housing units requiring follow-up, the Census Bureau must mount a nationwide recruiting campaign. Temporary staff are hired for this operation because it must be completed in only a few weeks. The most productive times to make contact with households are evenings and weekends, so this staff does not work a



full-time 40-hour work week. Most importantly, the Census Bureau tries to assign this temporary staff to neighborhoods with which they are familiar so that they are better received and the likelihood of collecting accurate data is enhanced.

Quality Assurance for Nonresponse Follow-up. The Census Bureau implements quality assurance operations for each of its major operations to insure that the results meet acceptable standards of quality. The quality assurance operation for nonresponse follow-up includes a reinterview of a portion of the cases completed by nonresponse follow-up enumerators. In this reinterviewing, an independent staff member conducts a brief interview to insure that the household was directly contacted the first time.

The Estimation Procedure. The characteristics of the sample housing units will be used to estimate the characteristics of the housing units not in the nonresponse follow-up sample. Take, for example, a census tract with 1000 housing units and mail-back responses from 800 (80 percent). In that case, information on the remaining 200 housing units would be based on a one in two sample of 100 housing units. If that same tract had responses from only 400 (40 percent), the Census Bureau would interview 500 addresses to estimate the 600 nonresponding addresses.

#### **F. Integrated Coverage Measurement**

Of all the innovations to improve accuracy in Census 2000, the most critical is Integrated Coverage Measurement (ICM). Inaccuracy largely stems from two problems. First, some housing units are never contacted because they are missing from the address

list. The Census Bureau's considerable effort to improve the quality of the address list for both urban and rural areas should serve to reduce the number of missed housing units. The second and much larger source of inaccuracy comes from missing people in housing units that do supply some information. The ICM not only helps with holes in the address list, it represents an effective way to address the second problem. That is why all three National Academy of Sciences panels recommended inclusion of the ICM in the plan for Census 2000.

The Census Bureau has a great deal of experience with Dual System Estimation, the methodology to be used in the ICM. The methodology was employed in the past two censuses to evaluate census quality. The methodology has undergone substantial review and improvement by the Census Bureau, the National Academy of Sciences, and by experts in statistical methodology from across the country. ICM methodology is generally accepted as the most reliable method to improve census results.

To conduct the ICM, Census Bureau enumerators will interview a carefully-selected random sample of about 750,000 housing units. This sample will be selected to include blocks from all areas of the country, with all race and ethnic groups, from all sizes of towns and cities, and from rural areas. The objective is to determine what proportion of the people living in the sample blocks were included and what proportion were excluded in the initial phases of the census. Because this sample is very large, and drawn separately for each state, it will provide reliable population numbers for every state and Congressional district.

Selecting the ICM Sample. As was done for the 1990 PES, to select the ICM sample for 2000, the Census Bureau plans to classify each of the country's seven million blocks into groups known as strata. These strata will be based on the characteristics of each block in the 1990 Census, such as the block's state, racial and ethnic composition, and proportion of homeowners to renters. The Census Bureau expects the types of sampling strata to be similar to those used for the 1990 Post Enumeration Survey (PES).

In Census 2000, the sample will be much larger (750,000 housing units versus about 150,000 in 1990) and strata will be defined within each state (strata crossed state lines in 1990). This will mean that in 2000, sample data from one state will not be used to determine the population total in a different state. In 2000, every state will have its own ICM sample, representative of all parts of that state. An example of a homogenous sampling stratum would be: All blocks in large central cities with a 1990 Census population that was 30 percent or more African American renters and with 10 percent or more Hispanic renters.

The Bureau will then select blocks at random from each stratum, for a total of 25,000 blocks. With blocks having an average of 30 housing units, the ICM will obtain information from 750,000 housing units. This process will establish a sample that is large enough, and sufficiently representative, to estimate population totals for each state. By stratifying and weighting the sample blocks the ICM will address coverage errors for specific population groups or areas, even if the individuals in the ICM sample constitute a relatively small part of the total population of the nation.

The ICM Address List. In order to ensure accuracy, the address list for the ICM is initially developed without use of the Master Address File. The Census Bureau will conduct a thorough, labor intensive canvass of each block in the ICM, an effort that would be logistically impracticable and too costly to repeat for all blocks in the entire nation. The list of addresses from the canvass effort is then matched with the MAF and differences are resolved.

The Initial ICM Interviews. Enumerators will use the ICM address list to conduct interviews at the 750,000 housing units in the sample blocks, and thereby establish an independent roster of Census Day residents. The enumerators will administer the ICM questionnaire and enter data via laptop computers. The Bureau expects to hire about 12,500 ICM interviewers and probably another 4,500 supervisors and quality assurance representatives.

Follow-up ICM Interviews. All housing units in which discrepancies are detected between the pre-ICM response and ICM response are designated for reconciliation and are usually assigned to a follow-up interview. The follow-up interviewer revisits each address for which there are inconsistent results and attempts to find the correct answer or the "true" situation. This process leads to a determination of whether the ICM response or the initial phase of the census is correct for a particular unit.

Poststrata. Each person is then assigned to a unique poststratum, or group of people who have similar chances (probability) of being counted in the initial data collection operation. The poststrata are defined by state geographic subdivision (such as rural or urban),



owner or renter, age, sex, race and Hispanic origin. The 1990 Census Post Enumeration Survey used 357 poststrata to characterize the population of four geographic regions of the United States. The ICM process in Census 2000 will also use poststrata to produce estimates for each state.

The results of the 1990 PES found that people living in rental housing units were much more likely to be uncounted. Therefore, the revised undercount estimates published in 1992 used owner-renter status in all the poststrata, except for Asians and Pacific Islanders, and American Indians on reservations. Basing the poststratification on the combination of variables defined by owner-renter status and race-Hispanic ethnicity improved the population estimates.

Nonresponse in the ICM. If the Census Bureau is unable to obtain an interview with an ICM sampled housing unit, despite intense effort, the Bureau will use imputation to account for the household. Imputation is a method that the Census Bureau has traditionally used when faced with legal deadlines and no alternatives to account for that household. Census Bureau research (from the 1995 Test and from the 1990 Census) indicates that imputation will have no major effects on the final results and that imputation is more accurate than leaving out missing information.

Dual System Estimation. Comparing the results of the ICM with the results of the initial phase of the Census will reveal who was missed in the sample blocks. The Bureau will then use a statistical method called Dual System Estimation to estimate the extent to which housing units and people were correctly included in the initial data collection phase, missed, or counted in error

for each state. Dual System Estimation is a widely-known and accepted statistical method that provides an accurate accounting of populations. Dual System Estimation works by comparing two independent sets (dual systems) of information on the same geographic area. In this case, the population being measured is in the 25,000 blocks that compose the ICM sample and the goal is to determine the true population of these blocks. For ICM sample blocks in Census 2000, the non-ICM set of information will consist of all direct responses gathered by mail, telephone, and personal visits. The second set of information comes from the ICM data on those sample blocks. Taken together, the two systems produce a single estimate of the total population.

Most of the housing units in the sample blocks and the people residing in them will be in both the initial phase and the ICM. A few people will be in one measure but not the other. Occasionally, an entire housing unit will be in one measure but not the other. Comparing the results of the ICM to the results from the initial effort (including mail, telephone and personal interviews) will inform the Census Bureau of the proportion of the population included in both, the proportion missed in the non-ICM effort, and the share included in the non-ICM effort but not in the ICM. These results are used to produce an estimation factor for each poststratum. Estimation factors account for the differences between the two efforts and for cases missed in both systems. The estimation factors are applied to the initial phase to estimate the total population and housing units in each poststratum. The sum across poststrata is used to estimate state totals. State totals are summed to national totals. The state level estimation factors by

poststrata are used to produce population and housing unit estimates for every block in the nation.

The Census Bureau is confident in the Dual System Estimation methodology based on its experience implementing Dual System Estimation and its expertise analyzing and explaining Dual System Estimation results. In 1990, the Census Bureau used Dual System Estimation to produce coverage estimates; the results from the 1990 Census were consistent with the independent benchmark of Demographic Analysis.

The Dual System Estimation theory requires that the two systems collect data independently. It does not require the ICM be superior to the "initial" system. In practice, the size of the sample will allow the Census Bureau to collect data in ways that would be prohibitive if attempted on the entire population. The ICM provides an independent, intensively-researched address list, and an intensive personal interview, designed to elicit complete and accurate information on people with characteristics that typically are missed in enumeration.

## **VI. OPTIONS FOR ADDRESSING AREAS WITH HIGH UNDERCOUNT RATES IN THE ABSENCE OF SCIENTIFIC SAMPLING**

The Census Bureau has designed its plan to achieve the most accurate enumeration possible within the constraints of established statistical procedures, available and reliable technology, reasonable budget resources, and the conditions of modern American society. Some have argued that the Census Bureau should be prohibited from using established and widely-recommended statistical procedures, including sampling, and should rely solely on physical enumeration methods. To rely entirely on physical enumeration would result in a substantially less accurate census even though it would cost substantially more.

The Census Bureau believes that, without the introduction of a limited use of sampling, Census 2000 will be even less accurate than the 1990 Census. The population expected to have a high rate of undercount with traditional methods has grown more rapidly than the total population. As a result, the Census Bureau estimates that a physical enumeration in 2000 would fall short of the actual population by at least 1.9 percent—more than 5 million people. Moreover, conducting Census 2000 without sampling would not address the recurring problem of the differential undercount.

### **A. The Census Bureau Could Face Severe Labor Difficulties if Forced to Take Census 2000 without Sampling**

To require that Census 2000 be conducted without sampling could raise practical hiring difficulties as well



as increasing cost. Just as changing conditions have reduced mail response rates, so have changing conditions reduced the Census Bureau's ability to attract and hire qualified enumerators. Using sampling techniques to complete the nonresponse follow-up operation significantly reduces the number of temporary enumerators that must be hired. Attracting and hiring a sufficient number of temporary employees in 2000 will be a difficult undertaking, even with the use of sampling.

The plan for Census 2000 assumes that the Census Bureau would have to hire over a quarter of a million temporary employees within a very few months. To do so, the Bureau would have to recruit over three million individuals. The nonresponse follow-up operation is particularly labor intensive. At peak employment, about 117,000 workers, approximately 47 percent of all temporary employees for Census 2000, would be hired to conduct the nonresponse follow-up at 22.5 million homes. Without sampling, enumerators would have to visit an additional 12 million homes, requiring 59,000 additional enumerators for the nonresponse follow-up operation. The Census Bureau has retained the services of Westat, Inc. to help it develop a model for setting enumerator wage rates in 2000. Wages will have to be set high enough to attract and *retain* qualified employees.

**B. The Only Alternative to Sampling Would Be to Rely More Heavily on Traditional Methods, Methods with Proven Limits**

The Census Bureau agrees with the Academy's conclusion that more radical alternatives to a traditional enumeration (a national register, an administrative

records Census and a Census conducted by the U.S. Postal Service) are either not feasible or not consistent with American values.

As discussed in Section III, the Census Bureau is committed to using traditional enumeration methods and the plan for Census 2000 contains several innovations to these traditional methods. The Census Bureau's experience, and the Academy's research, however, indicate that even with improvements traditional methods of enumeration cannot achieve satisfactory accuracy.

Between 1970 and 1990, the Census Bureau tested a number of outreach, coverage, and collection procedures designed to increase accuracy, particularly in areas with high undercount rates. Some of these innovations, described below, improved accuracy—though they did not prevent the level of inaccuracy from rising in 1990—and will be used in Census 2000. Other innovations were proved to be prohibitively expensive, hard to control, error prone, or ineffective.

Among the innovations that have been tested are:

*Advertising*—The Census Bureau launched a massive outreach campaign in the 1990 Census, using public service announcements as advertisement. The Bureau's conclusion was that advertising improved the mail response rate but that its effectiveness in reaching areas with high undercount rates needed improvement.

Status: In Census 2000 the Bureau plans a \$100 million paid advertising campaign targeted at areas with low mail response rates. (See the discussion in Section II (B)(2))

*Advance Post Office Check*—USPS letter carriers in 1990 verified the completeness of the address list by making corrections, identifying duplicate and undeliverable addresses, and reporting missing addresses. This approach was successful, but not efficient enough.

Status: Better partnership with the USPS and with state, local, and tribal governments have allowed the Bureau to replace this procedure with more efficient and more comprehensive programs for Census 2000. The 1990 Census spent too much time and money developing an address list that the USPS already had assembled. For Census 2000, the Census Bureau began with the USPS information to avoid a costly duplication of effort. State, local, and tribal governments are working with the Bureau to correct and update census maps on a continuing basis.

*Casing Check*—Immediately prior to the delivery of the 1990 Census questionnaires, USPS letter carriers identified deliverable and undeliverable addresses, and notified the Bureau of any homes on their route that did not appear on the Bureau's list.

Status: Better partnership with the USPS, and with state, local, and tribal governments have allowed the Bureau to replace this procedure with more efficient and more comprehensive programs for Census 2000.

*Census Awareness and Products Program*—This program built awareness about the 1990 Census by educating the public and encouraging it to participate. Census Community Awareness Specialists were hired to contact teachers, mayors, religious groups, and others, and to develop promotional materials.

Status: This program forms the basis of the Census 2000 partnership programs.

*Census Closeout Address Check*—During the final stages of field follow-up activities in 1990 USPS letter carriers provided information about the type of structure, occupancy status on Census Day, and the number of Census Day occupants for unenumerated units. This approach was successful, but not efficient enough.

Status: Better partnership with the USPS, and with state, local, and tribal governments have allowed the Bureau to replace this procedure with more efficient and more comprehensive programs for Census 2000.

*Parolee/Probationer Coverage Improvement Program*—People on parole or probation completed a unique census form to help ensure that they were counted in the 1990 Census.

Status: The Census Bureau dropped this program from consideration for Census 2000 because it was error prone and not cost effective.

*PreCensus and PostCensus Local Review*—In 1990 local and tribal government officials reviewed housing unit counts and group quarters population counts for each Census block in their jurisdictions and identified missed units.

Status: This program has been replaced in Census 2000 by the greatly expanded Local Update of Census Addresses (LUCA) program, made possible by amendments to Title 13.



*Recanvass*—Enumerators did a second canvass of addresses in selected neighborhoods to look for missed units in areas with evidence of deficient housing unit counts.

Status: The Census Bureau dropped this program from consideration for Census 2000 because it was ineffective.

*Shelter and Street Enumeration*—The Census Bureau took a special enumeration of people in shelters and at pre-identified street locations in the 1990 Census.

Status: In Census 2000, the service-based enumeration operation will use statistical estimation to improve the enumeration of people with no usual residence. ICM procedures will be adapted to conduct an initial enumeration at locations where people with no usual residence receive services (shelters and soup kitchens). A second visit may be conducted at a sample of locations to account for people who were not present at the time of the initial data collection operation, but who do use services at other times. If sampling and estimation were prohibited, the Census Bureau could not make this follow-up visit. People who were not present at the time of the initial data collection operation would be encouraged to use other opportunities to be included in the census but coverage of the people who frequent these sites would not be as complete.

*Telephone Assistance Adds*—In the 1990 Census, people who called to say they had not received a questionnaire in the mail were told to wait for a personal visit interview.

Status: The Census Bureau will expand the telephone assistance program in Census 2000 to include the ability to take interviews over the phone.

*Transient Enumeration*—The Census Bureau took a special enumeration of individuals residing in hotels, motels, tourist homes, campgrounds, and marinas in the 1990 Census.

Status: This program has been retained for Census 2000.

*Vacant/Delete/Movers Check*—Enumerators revisited all addresses classified during nonresponse follow-up as vacant or delete to verify Census Day occupancy status and to complete questionnaires for people who moved during the enumeration period.

Status: This operation will be done more efficiently in Census 2000 by revisiting only a sample of the units classified as vacant. Without sampling, that efficiency would be lost.

*Were You Counted Campaign*—People who thought they were missed in the 1990 Census had the opportunity to complete a simplified census questionnaire late in the census program.

Status: In 2000, the "Be Counted" program will make census forms available in public places, such as community centers and post offices—at the same time as key data collection activities and advertising are taking place.

*Post Enumeration Post Office Check*—An operation to improve coverage in very rural areas was used in the 1970 and 1980 censuses. After the census enumeration

was completed, the Postal Service reviewed the addresses collected by the enumerators and identified any missed living quarters.

Status: This approach was not successful enough to merit its continuation.

**C. Spending More on Outreach Instead of Sampling Would Leave an Unacceptably Large Undercount and Have Biased Results.**

Spending more on public outreach and enumerators will not adequately address the undercount problem. For a variety of reasons, accounting for every address does not guarantee that every person at that address is reported. In some cases, nontraditional family situations make reporting difficult. For example, children who share time with divorced parents, or with their extended family, may not be counted in either household. In other cases, non-traditional housing situations may lead to incomplete results. For example, landlords may assume that a tenant sharing their home is being counted separately. In some cases, individuals are missed because the respondent could not list his or her entire family in the space provided, or because the respondent's English language skills are limited. In others, individuals are missed because of enumerator error.

**D. Without Sampling, Costs Would Increase by at Least \$675 Million and the Final Count Would Be Less Accurate Than the 1990 Census.**

As planned, Census 2000 is projected to cost approximately \$4 billion. A cornerstone of the Census Bureau's plan is to reduce costs and increase accuracy by using scientific sampling methods while making a

"best faith effort" to include every resident of the United States with traditional enumeration methods. The use of statistical methods, both to complete nonresponse follow-up and to implement the ICM survey, will address historic problems associated with cost, incomplete coverage, and the differential undercount. Using sampling techniques to finish the initial phase will provide the time and funds needed to implement the ICM survey, which will eliminate the need for costly add-on operations that otherwise would be necessary to increase the completeness of Census 2000. If sampling is prohibited while these add-on activities are implemented, Census 2000 would probably leave approximately 1.9 percent of the population uncounted and thus be even less accurate than the 1990 Census.

The following sections analyze available options for reducing the undercount in areas with high undercounts, without the use of statistical methodologies. The increased costs, which are summarized at the end of this Section, would be attributable to the following additional expenditures:

*100 Percent Follow-up On Non-Responding Units.* After the mail and telephone response period, the plan for Census 2000 calls for collecting information from a sample of nonresponding addresses in each Census tract. The sample will be drawn to assure that information will be obtained from at least 90 percent of addresses in each census tract. This effort will require sending enumerators to 22.5 million addresses. However, with a ban on sampling, enumerators would have to visit all of the expected 34.5 million nonresponding addresses. To send enumerators to an



additional 12 million nonrespondent addresses would cost a projected \$400 million more.

*Significantly More Effort Would Be Required to Verify Vacant Units.* Since 1970, letter carriers have been the primary source of information as to which housing units are vacant. Because the 1970 Census found 11.4 percent of its sample of vacant units were in fact occupied, the Bureau had to raise the enumeration level by more than one million persons. In the 1990 Census, the Census Bureau initially classified about 7 million housing units as "vacant" and 3 million addresses as "not living quarters" and assigned them for field verification. About 9 percent of the initially "vacant" units had to be reclassified as "occupied" on Census Day and about 12 percent of the units classified as "not living quarters" changed classification after field verification. In total, this effort resulted in counting 1.5 million more people.

The plan for Census 2000 includes a field verification of a ten percent sample of the cases identified as vacant by the Postal Service. The Bureau expects that the USPS will identify five percent of housing units as being vacant on April 1, 2000. This verification will ensure the integrity of the information provided by the USPS, and gather information about the characteristics of those vacant units. If sampling were not permitted in Census 2000, the additional amount of effort and person hours needed to verify occupancy status would dwarf the considerable effort now planned. Under a 100 percent verification plan, the Census Bureau would assign all of these cases to field staff to verify their status as of Census Day. The field visits will be integrated with nonresponse follow-up, starting in

April 2000. This additional effort would require 25,000 to 30,000 enumerators, as opposed to the 5,000 required using sampling, at an additional cost of \$200 million.

*100 Percent Follow-up of Incomplete Questionnaires Would Be Necessary.* The plan for Census 2000 requires only a computer check of the questionnaires that are returned by mail for evidence that coverage problems exist. Questionnaires flagged as having problems are sent for a telephone follow-up to attempt to resolve the discrepancies. Estimates are that approximately 0.5 percent of questionnaires will require follow-up. The ICM will account for coverage errors not corrected by this operation. The plan also includes follow-up for households containing more than five people (since the questionnaire only provides space for recording data for five people).

A plan that does not include sampling would require a much more thorough editing and follow-up of the questionnaires. During the processing of mail returns, phone-in responses, and check-in of enumerator-completed questionnaires at Local Census Offices, the Census Bureau would identify all cases that require additional contact to ensure the accuracy of the reported information. These cases would include households that return a blank questionnaire in the mail, questionnaires with a discrepancy between the total number of household members and the number of people for whom census data are provided (for example, the questionnaire lists the names of four persons but provides information only for two), and questionnaires with other indications of coverage problems, such as confusion over residency status. This additional effort would cost \$150 million more than current plans.

*Expanded Partnership and Promotion Activities Would be Required.* The promotion and outreach program is designed to motivate people to respond. While the Census Bureau does not envision additional partnership and promotion activities if it is not allowed to use sampling, the time period for planned promotion activities would have to be extended to include a longer nonresponse follow-up period. Also, the Census Bureau would need to hire additional staff to provide at least one partnership specialist for each Local Census Office. The Bureau would expect to pay \$75 to \$150 million more for these activities.

*Deployment of Special Enumeration Activities.* The Census Bureau has developed targeted methods to supplement its basic data collection strategy. If the Bureau is banned from using the best available statistical methods in 2000, the activities summarized below would need to be intensified, and started sooner than currently planned. They would cost \$25 to \$50 million more.

Team enumeration. In targeted areas, a team or crew of enumerators conducts the enumeration in a short period of time. Team enumeration will be used in areas where conditions in the field may interfere with the timely completion of the enumeration. These conditions may be high concentrations of multi-unit buildings, enumerator safety concerns, and low enumerator production rates.

Urban update/leave methodologies. The urban update/leave operation will be conducted in selected urban areas where mail delivery is a problem. During the operation, enumerators in

teams will hand-deliver census questionnaires to households and ask respondents to complete the forms and mail them back.

*Quality Assurance.* The techniques used for quality assurance operations would need to be enhanced. Without ICM to provide final quality assurance, all quality assurance operations will require extra efforts at an extra cost of \$25 to \$50 million.

*Post Census Evaluation Study.* The Census Bureau will conduct a thorough evaluation of Census 2000. Without the use of sampling the Bureau would gather data for the evaluation through a post enumeration survey.



**Summary of Additional Costs with a  
Ban on Statistical Methods**

100-Percent Follow-up on non-responding units	\$400 million
100-Percent Follow-up on Vacant Housing Units	\$200 million
100-Percent Follow-up on Incomplete Questionnaires for Coverage	\$150 million
Expand Partnership Activities	\$25-50 million
Expand Promotion Activities	\$50-100 million
Deploy Special Enumeration Activities	\$25-50 million
Greater Quality Assurance	\$25-50 million
Eliminate Integrated Coverage Measurement (ICM)	-\$325 million
Conduct 1990-style Post-Census Evaluation Study	\$125 million
<b>TOTAL:</b>	<b>\$675-800 million</b>

**VII. AN ILLUSTRATION: THE MILWAUKEE COMPLETE COUNT CAMPAIGN**

The Milwaukee Complete Count campaign illustrates the benefits and limitations of increased public outreach efforts in support of the census. The city government of Milwaukee, Wisconsin, was one of the Census Bureau's most enthusiastic supporters for the 1990 Census. Its "Complete Count" outreach campaign began in October, 1989, with a rally, peaked with a wide variety of activities from February through April, 1990, and ended with a "Were You Counted?" campaign in June, 1990. The cost to the city was about \$300,000, plus another \$55,000 of in-kind services. Additional donated and discounted services were valued at \$62,000.

While Milwaukee's efforts increased its count, they also demonstrated that the best of efforts still leave a sizeable undercount. Even with Milwaukee's unprecedented efforts, the Post Enumeration Survey indicated that approximately 2.3 percent of the city's residents were missed, which was higher than the national average.

Research on 1990 Census outreach efforts such as those in Milwaukee has found that such efforts increased mail response, but did not eliminate coverage error. Milwaukee's efforts probably raised the mail return rate because its return rate of 76 percent was slightly higher than the national average of 74 percent (among the 26 cities of 500,000 or more, Milwaukee ranked third in mail return rates). A higher mail return rate still left 24 percent of occupied units in the city to be counted by door-to-door enumerators, and not every Milwaukee

Census tract had 24 percent non-response to mail questionnaires. Those tracts with minority populations of 80 percent or more had a mail nonresponse rate of 40 percent, almost four times the 11 percent rate in Milwaukee tracts with less than 10 percent minority populations.<sup>4</sup>

Administrative data also confirm a bias with traditional census methods, even with an aggressive outreach campaign such as that conducted by Milwaukee in 1990. An academic study compared the number of children found in Milwaukee in the 1990 Census with the number of children on AFDC records. The study found that the 1990 Census undercounted children in 52 selected census tracts.

Was Milwaukee's Complete Count campaign a success? To the extent that the campaign boosted mail response, it was a success. But the Milwaukee campaign also demonstrated the limits of spending money on outreach. Outreach has the potential to improve accuracy by boosting the mail return rate; it does not eliminate the undercount or the differential undercount.

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<sup>4</sup> The mail return rate is calculated by dividing the number of mail returns by the number of housing units that were occupied. This rate differs from the "Mail response" rate mentioned earlier in this report that is calculated by dividing the mail returns by *all* housing units (including vacant units and deleted units). The mail response rate is important to use during Census operations to determine quickly the nonresponse follow-up workloads.

## VIII. EXPECTED ERROR RATES

Errors in the census can arise from many sources— from respondents misunderstanding instructions, declining to participate, or giving inaccurate answers; from enumerators, postal workers, telephone operators, and data processors who make mistakes; from incorrect address lists; from poorly-worded questions; and from the way a census is planned and implemented.

Errors are grouped into two basic types — those that occur during the measuring or data collection process (**nonsampling error**), and errors that occur because only part of the population is being directly contacted (**sampling error**). Nonsampling error occurs in both censuses and sample surveys; sampling error only occurs in sample surveys. Nonsampling errors can be the most serious types of errors because they yield *biased* results when most of the errors distort the results in the same direction. Decennial censuses have traditionally experienced nonsampling errors, most notably coverage error, or undercount, resulting from persons missed or double counted during the enumeration process.

### A. Nonsampling Error

Reducing and measuring nonsampling error is more complex than measuring and reducing sampling error. Sampling error can be measured, which is the reason it often gets more attention than nonsampling error. But nonsampling error and its consequent biases are present throughout the census process and can reduce the quality of results more than sampling error.

Sources of non-sampling error include:



**1. Coverage Error.** The 1990 Census and earlier censuses have been criticized for coverage error, that is, for missing people and housing units. This coverage error arises from two general problems—missing entire housing units and missing some or all of the people in an enumerated unit. Based on the 1990 PES results, 69.5% of the coverage error came from enumerated housing units and the remaining 30.5% came from housing units that were not enumerated at all.

**2. Nonresponse Error.** Nonresponse error occurs when (1) housing units or people cannot be located or refuse to participate, or (2) answers to one or more items on the questionnaire are missing.

**3. Observational Error.** Observational error occurs when the questions asked on a census or survey yield inaccurate answers. These kinds of errors can be attributed to the interviewer, the questionnaire, the respondent, or the means by which the data are collected (telephone, personal visit, mail).

**4. Data Processing Error.** Data Processing error occurs after the data are collected, as a result of actions of processors—during data entry, coding, editing, tabulation and other processing activities. Errors can also be introduced when missing data items are created from statistical modeling procedures (*i.e.*, imputation).

#### **B. Sampling Error**

With any sample, scientifically selected or not, differences are likely to exist between the characteristics of the sampled population and the larger group from which the sample was chosen. However, in a scientific

sample, sampling error is readily measured based on the mathematics of probability. Estimates of sampling error are referred to as sampling variance and are commonly expressed as the standard error as a percent of the population total. To a certain extent, sampling error can be controlled—samples can be designed to ensure comparable levels of error across groups or across geographic areas.

#### **C. Error Related to Estimation**

**1. Model Error.** Model error results from the use of statistical techniques to apply what one has learned from a sample of the population to improve the numbers for the entire population. For Census 2000, this type of error can arise in using ICM results to improve the census totals. The effect of model error is that the improvements being made to the totals are not perfect. The accuracy of ICM is based on the assumption that all individuals have the same chance to be included in the initial collection phase or in the ICM. The chances of inclusion can be different for the two systems. Because past experience with differential undercount demonstrates that some groups in the population are more likely to be missed in any physical enumeration, the Census Bureau defines poststrata. Poststrata are groupings based on variables that previous studies have shown to be related to coverage error. Examples of poststrata are renter-owner status, race and Hispanic origin, age, sex and urban-rural residence. Dual System Estimation assumes that the probability of being included is uniform *within* these poststrata. However, there still are differences among the individuals grouped within each poststratum. These differences are called "heterogeneity."

Heterogeneity within a poststratum affects the census totals in two ways and can result in an overestimate or an underestimate of the count. First, the estimation within a poststratum can fail to capture the variation in coverage error among small areas. Second, heterogeneity can make the poststratum estimate too low, so that not all misses are measured. This second effect is called correlation bias. Correlation bias is caused by the fact that people missed in the initial mail response and nonresponse follow-up are also more likely to be missed in the ICM survey. This problem leads to lower estimates of the undercount. Several research projects are in progress to assess and deal with error stemming from heterogeneity.

**2. Matching Error.** Matching error occurs, for example, when the ICM results are compared with the results of the initial phases of the enumeration. A person could be "in" both systems in reality, but only identified in one—either the initial phase or the ICM. When a difference is detected between the two data sets, follow-up interviews are conducted to resolve the inconsistencies. New computer technologies in Census 2000 for unduplication should reduce matching error.

**3. Contamination Error.** Contamination error occurs when there are two separate data collection activities. This error occurs when inclusion in one collection affects the response in the other collection.

#### **D. Gross Error Versus Net Error**

There are three types of coverage error—omissions, duplicates, and erroneous inclusions. Omissions occur when housing units or people are missed. Duplicates occur when housing units or people are included more

than once. Erroneous inclusions occur when people are incorrectly included in the initial enumeration because they are fictitious, in the wrong geographic location, etc. These types of errors can be combined to produce either net error or gross error numbers. Gross error refers to the total number of errors made in the census, while net error refers to the total effect of these errors on the resultant statistics. For gross error, the effect is additive; that is, the sum of people omitted *plus* duplicates *plus* erroneous inclusions. For net error, the errors are treated as an excess (duplicates and erroneous inclusions) or deficit (omissions), depending on the type of error, and the effect of combining produces a canceling-out effect. Gross error measures the total number of mistakes; net error measures the undercount.

The 1990 Post Enumeration Survey (PES) was designed to measure the net undercount in the 1990 Census by population group and to provide the data to adjust for that net undercount. However, due to interest in the level of gross errors, the data have been used to provide estimates of gross omissions, gross erroneous inclusions, and total gross coverage error. As the PES was not designed to estimate gross errors, there was no specific method for obtaining these estimates. Care must be taken in interpreting the gross error numbers; some of the measures and concepts are appropriate only when considered in terms of the way they produce net estimates, and all the PES numbers are subject to sampling error.

The Census Bureau cannot measure precisely and separately the effects of all the types of error described above. To the extent that it can measure and compare



gross error, the Bureau has reviewed the gross (combined) error for 1990 and estimated the likely net error for 2000 with and without sampling.

The 1990 Census had a net undercount of approximately 4 million people. This figure is called "net" because it is the difference between the number of residents who were not counted at the geographic location being considered, less those residents incorrectly included or counted twice at the geographic location being considered. The gross error in the 1990 Census, however, was more than 26 million people: 15 million people were not counted at all, or were not counted in the correct block, while 11 million people were incorrectly included in a block. The incorrect inclusions may have been counted in more than one block or merely assigned to an incorrect block. The net number of people not included in the national total represents the 4 million national net undercount.

Many users of census data are interested in gross error based on larger geographic areas, that is, many users do not care whether the people are counted in the correct block. When one ignores errors associated with individual blocks or other small areas, the gross error in 1990 was about 12.8 million people, with 8.4 million people not counted and 4.4 million people counted twice or incorrectly included in the census.

Looking to Census 2000, the Census Bureau has estimated the likely net error (from those types of error that can be measured) both for its plan and for a physical enumeration plan. A plan without sampling would include all the modernization plans for Census 2000 except for those that involve sampling. A modern non-sampling plan would cost \$675 to \$800 million more

than the current sampling plan (additional costs detailed in Section VI (D)) and would be substantially less accurate.

#### **E. Summary of Estimated Error, by Geographic Level Down to the Census Tract, for Plan Alternatives**

The Census Bureau and the Academy believe that the introduction of a limited use of sampling will make the census more accurate at the geographic levels for which its data are most critical: national, state, and Congressional district. With sampling, the estimate is just as likely to be above the true population as below it. The error declines as small areas are added together to create larger ones, such as Congressional districts.

All error figures in the table below were derived using simulations of 1990 Census estimates of undercounts and overcounts for census tracts. The Bureau has concluded that the error from the proposed plan will be 1.1 percent at the census tract level, 0.6 percent at the Congressional district level, 0.5 percent at the state level, and 0.1 percent at the national level. In contrast to sampling, physical enumeration methods are more likely to result in an underestimate of the population regardless of the size of the population area. The projected error from a physical enumeration and with no sampling in 2000 would average 1.9 percent at all levels from the census tract level to the national level.

	National	States	Congres- sional Dist- tricts	Census Tracts*
The Census 2000 Plan	0.1%	0.5%(0.2% - 0.5%)	0.6%(0.3% - 2.3%)	1.1%(0.6- %2.4%)
Improved procedures without any sampling	1.9%	1.9%(0.4% - 3.2%)	1.9%(-1.2% -7.0%)	1.9%(- 1.2%- 6.2%)

\*The range of error at the tract level has been "trimmed" so that it does not include the most extreme outliers—the highest and lowest 3 percent.

(Chart Omitted)

Note that this simulation exercise does not produce the same errors for all states, Congressional districts, or tracts. The estimates shown in the table are the average errors at each level. The numbers in parentheses show a high and low range of estimated errors at each level on a consistent basis. The "Combined Error" figures for Congressional districts and census tracts do not include error due to modeling; model error would not apply to the nonsampling alternative.

To account for expected growth in the population of the United States through the year 2000, the 1990 census tract population totals by race and Hispanic origin were projected using factors derived from a widely used process known as Demographic Analysis. The simulations assume that the percentage undercounts (and

overcounts) measured for each group in the 1990 PES also would apply in Census 2000. To determine the amount of undercount or overcount for each census tract, the projected population totals for each were computed with and without the results of the 1990 PES for each region and for the various segments of the population within it. The totals for the specific census tracts in each geographic entity were summed to derive the error rates for more populous geographic levels, such as Congressional districts, states, and the nation.

In addition to foregoing improvements in accuracy, a ban on statistical procedures in Census2000 would have other wide-ranging effects. Such a ban would preclude the cost-effective use of statistical sampling to check the vacancy information provided by the USPS. It would preclude the two most significant operations planned to reduce costs and improve the accuracy of Census 2000: the use of statistical sampling to finish the initial task of making contact with someone at an address; and the use of statistical sampling to account correctly for those individuals who are missed or counted more than once during the initial operation and follow-up. The bottom line is that a ban on scientific sampling for Census 2000 would make the census less accurate than it could be, and more costly than it should be.

#### F. Error Rates at the Block Level

Given the constitutional purpose of the census to serve as the basis for apportioning the 435 seats in the House of Representatives among the states, the census is designed to maximize accuracy at the state level. Because census results are also important for drawing state legislative district boundaries and allocating



grants to substate jurisdictions, the Census Bureau must also concern itself with accuracy for smaller geographic areas.

Neither the traditional methods used in the 1990 Census nor the scientific sampling methods planned for 2000 have emphasized accuracy at the block level. This lack of emphasis is appropriate because the population of stand-alone blocks is not used to determine legislative districts or to distribute population-based funding.

Error rates were quite substantial at the block level in the 1990 Census. The blocks in the Post Enumeration Survey had an average error of 7.6 percent. In many cases, a housing unit was assigned to the wrong block, which contributed to error in two blocks, one positive and the other negative. Just as with sampling error, large block level errors due to assignment to the wrong block tend to cancel each other out when blocks are aggregated together. When blocks are aggregated to census tracts and larger geographic areas, sampling errors decline sharply. The percentage error rate also falls when aggregating from the block level to the tract level using only traditional methods, but it does not decline as sharply as sampling error does, so that a sizeable undercount remains. Thus, at the census tract level and larger areas of geography, the Census 2000 plan is more accurate than a census without sampling.

The Academy Panel on Alternative Methodologies warned against putting too much emphasis on accuracy at the block level in its Second Interim Report last month:

The important point to note here is that for the counts for census blocks, the level of sampling error is, relatively speaking, not an appropriate criterion for judging the quality of the census. Although block counts may contribute to the congressional redistricting process, for example, it is important to keep in mind that the results in a redistricting process are the counts for the congressional districts that are eventually created (and to a lesser extent, the counts for districts that were, or conceptually might have been, considered but were discarded). For these kinds of counts, the level of sampling error will be modest because the larger the number of observations used for an estimate, the smaller its sampling error will be.

Thus, in the panel's view, the important considerations for evaluating whether the amount of sampling error present in the census process is acceptable are not those that relate to counts for very small units, such as blocks. It is clear that at that level, sampling error may be substantial in some cases (again, relative to the size of the block). The evaluation of sampling error should take place for the geographic level counts that have important legal, political, or financial implications. For such levels, a census that uses sampling can achieve results that are at least as good as those from a more time-consuming and expensive effort to obtain a completed form for every household.

Questions have been raised about calculated error rates at the block level in the 1995 Census Test of some census methods. The 1995 Census Test, conducted in Oakland, California, Paterson, New Jersey, and six

parishes in Northwest Louisiana, was designed as an experiment to test various methodologies for sampling for nonresponse follow-up and Integrated Coverage Measurement; the test was not an attempt to demonstrate Census 2000 sampling methods. In particular, the 1995 test has no relevance for the important question of whether a census based on scientific sampling is more accurate than a census based only on physical enumeration. The only estimates of error at the block level in the 1995 test result from statistical theory based on the size of the sample. The estimates do not compare the results of sampling with the true population total at the block level, an unknown number.

The following table shows the block level sampling error of the samples used in the 1995 Census Test:

Summary Statistics for the Block Level  
Coefficients of Variations 1995 Census  
Test Sites

Test Site	Weighted Average	Minimum	Maximum
Paterson	0.1828	0.0559	2.4336
Oakland	0.1262	0.0403	1.4359
NW Louisiana	0.2519	0.0438	1.5142

Source: 1995 Census Test

The nonresponse sample sizes in each site for the 1995 Census Test were much smaller than the Census 2000 design would require. In Oakland and Paterson, the

Census Bureau sampled about one in three nonresponding housing units, while in Northwest Louisiana, it sampled one in four. Under the Census 2000 design, the Census Bureau would have sampled approximately three out of every four nonresponding housing units in Oakland and Northwest Louisiana; the rate in Paterson would have been five in six, given initial response rates in these three sites.

The implication of the smaller sample sizes is that the block level error rate from the 1995 Census Test is substantially greater than the expected error rate using the Census 2000 design. The effects are illustrated by comparing what was achieved in these three sites to the sampling error expected in Census 2000. For Paterson and Northwest Louisiana, the 1995 errors were three times or more larger than anticipated 2000 errors. For Oakland, the errors in 1995 were about 2.5 times as large. These calculations are based on the current Census 2000 design of reaching 90 percent direct response in each census tract.

Calculations of average error for small blocks can be misleading to those unfamiliar with these statistics. Statistical theory expects that small samples from small population blocks will have large errors. But a large percentage error of a small population number is still a small number. For example, the block in Paterson, New Jersey, that had an estimated error rate of 243 percent had only one resident. Because small blocks contribute less in any aggregations, the large percentage errors for some small blocks have little practical effect.



## IX. PROCEDURES TO ENSURE UNBIASED STATISTICAL DECISIONS

Concern has been expressed that the formulas for drawing samples or for extrapolating from sample data in the Census 2000 could be surreptitiously manipulated for political ends.<sup>5</sup> This concern is misplaced. Every effort has been made to ensure the independence and integrity of the decisions by the professional statisticians at the Census Bureau. The professionals have been—and will remain—insulated from political interference throughout the Census 2000 process.

The Census Bureau has a long history of political independence. The Bureau refused, when requested during World War II, to identify Japanese-American individuals from Census Bureau records, relying on its specific confidentiality requirement in Title 13 of the U.S. Code. In the past, the Bureau resisted attempts to manipulate poverty statistics. The Census Bureau is

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<sup>5</sup> The decennial census is of immense importance to political representation and federal funds distribution. The census' very importance virtually ensures that political groups will be vitally interested in the outcome of each decennial. The 1920 Census is a vivid illustration of the intense political interest in the census. The shift in the nation's population between 1910 and 1920 from rural areas and foreign lands to America's urban areas so disturbed the balance of power in Congress that the House of Representatives was never able to agree on a plan to reapportion itself. Congress essentially ignored the results of the 1920 Census and did not reapportion until after the 1930 Census. Congressional debate over the proper method of apportionment ultimately lead to request for a National Academy of Sciences report, the results of which became the basis of the reapportionment statute, 2 U.S.C. § 2a. Title 2 now provides for automatic reapportionment of the House of Representatives upon the reporting of the census numbers by the President to Congress.

staffed by many of the world's preeminent professional statisticians and demographers; it is a professional organization with a long history of scientific integrity. It is worth noting also that none of the myriad lawsuits brought after the last three decennial censuses resulted in the Census Bureau changing its final enumeration. The Census Bureau will continue to resist any attempts to manipulate its data or processes; accuracy will guide all operational decisions in Census 2000.

In fact, experts agree that the use of sampling in Census 2000 should minimize the opportunity for political manipulation, not increase it. Sampling has known, objective properties. The known properties of sampling are preferable to the certainty of missing several million people using traditional counting methods alone. In fact, uncontrolled error is more of a concern with a traditional headcount than it is with sampling.

The basic statistical framework for Census 2000 was developed by the Census Bureau in tandem with the Academy. The Academy study mandated by Congress in 1991 recommended the major innovations for Census 2000. Concluding that continued reliance on traditional enumeration methods was futile, the Academy recommended that the Bureau adopt both sampling for nonresponse follow-up and sampling with a very intensive quality check process to provide a statistical enumeration more accurate than is possible with a physical enumeration. The Census Bureau has spent the last five years turning the Academy's initial and ongoing recommendations into a detailed plan. The Bureau has also been working with its advisory committees, conducting public meetings, and having

discussions with Congress to refine the details of the plan.

The Census Bureau is committed to making its decisions on formulas in a very open process. This openness should prevent not only the possibility of surreptitious manipulation, but the perception of possible manipulation.

The Census Bureau has proposed to the National Academy of Science's Committee on National Statistics that it convene a fourth expert panel to guide the Bureau's work for Census 2000. This new group of outside experts would critically review the statistical procedures for the Census 2000, in particular the use of sampling for nonresponse follow-up and Integrated Coverage Measurement. These experts will comment on the planning process, suggest improvements and preferred approaches, and review other procedures that may be considered during the enumeration in order to increase accuracy. The panel will be established in the Fall of 1997 and continue its work through the Spring of 2001, with the reporting of census results for reapportionment and redistricting. This open, expert review will:

- assure the objectivity, scientific validity, and integrity of the 2000 Census,
- assist the Bureau in its goal of producing a more accurate Census, and
- improve understanding of how sampling and statistical estimation procedures contribute to achieving a more accurate Census.

The panel will consist of widely and highly regarded experts on census matters, statistical methodology, sampling, survey research, demography, and other social and behavioral sciences. The panel will interact with the Census Bureau as follows:

- Census Bureau will develop statistical procedures for Census 2000.
- The panel will convene periodic open workshops to review specific procedures, inviting other experts and various stakeholders to attend and critique the Bureau's procedures.
- Following each workshop, the Census Bureau will, as necessary, revise its planned procedures based on issues raised and suggestions made at the workshop and then resubmit the procedures to the panel.
- The panel will review the Census Bureau's revised procedures, other documentation, and the workshop proceedings and then issue its assessment of the specific procedures planned. These reports will be reviewed by the Committee on National Statistics, the Commission on Behavioral and Social Sciences and Education, and other expert groups in accordance with National Research Council procedures.
- The Census Bureau will finalize its procedures prior to the Census, based on the recommendations of the panel.



- During the conduct of the actual enumeration, the panel will review the statistical procedures as they are implemented, as well as other procedures that may be considered in order to increase accuracy.

The Academy Panel on Alternative Methodologies concluded that this process of outside peer review would remove potential objections to the use of sampling:

If sound procedures are developed by the Census Bureau and communicated to users, the panel believes that it will be possible for the Bureau to address all reasonable potential objections to the uses of sampling and to satisfy users that the use of sampling has added to the soundness and quality of the 2000 Census, rather than detracting from it.

By mid-1998, the Bureau will make all its planned formulas available for scrutiny by the public, the professional statistical community, and the new Academy panel. The Bureau will consider all comments and criticisms for more than a year. Then, based on the best professional judgment at the time, the Census Bureau will announce and "lock in" its final set of formulas—well in advance of the collection of any data in 2000. Fears that the Census Bureau will collect data in 2000 and then use new formulas designed to achieve some purpose other than the most accurate census possible are completely without foundation.

## X. LEGAL CONSIDERATIONS

The plan for Census 2000 is both Constitutional and legal.

The Assistant Attorney General for the Civil Division in the Bush Administration, Stuart Gerson, concluded in a July 9, 1991 opinion that the Constitution's requirement of an actual enumeration refers to the accuracy of the census, not to any particular method of census taking. In addition, the Assistant Attorney General concluded that the weight of caselaw on the Census Act does not prohibit adjustment. Mr. Gerson detailed his careful examination of the Constitution's requirement for an "actual enumeration" in testimony before the Senate Committee on Governmental Affairs on April 16, 1997. He explained that, at the time the Constitution was written, the term "actual" meant both "existing in act or fact" and "in action or existence at the time, present, current." He noted that Georgia was seeking representation in the Congress to be formed based on Georgia's expected population growth rather than its current population. He concluded that the term "actual" suggest the 'Framers' intent that the census be based on current population, as opposed to taking into account potential population growth. It does not appear to delimit the means by which an accounting of the currently existing population may be determined.

In evaluating the term "enumeration," Mr. Gerson similarly found no reason to favor sole reliance on physical enumeration to the exclusion of statistical sampling:

In sum, the essence of enumeration, as the term is both generally and constitutionally understood, is more likely found in the *accuracy* of census taking rather than in the selection of any particular method, i.e., a headcount. [emphasis added]

In 1994 the Department of Justice (DOJ) reviewed the Census Bureau's preliminary plans to use sampling in Census 2000 and issued a written opinion confirming that the plan was neither illegal nor unconstitutional. This DOJ opinion is premised on a long line of federal court cases holding that neither the Constitution nor the Census Act bars the use of sampling in a decennial census, so long as sampling is not used as a substitute for a traditional enumeration.

In addition, the Supreme Court recently resolved the most prominent case challenging the 1990 decennial Census, *Wisconsin v. City of New York*, 116 S. Ct. 1091 (1996). While the Court's opinion did not directly address the legality of sampling, the Court confirmed that the Secretary of Commerce enjoys broad discretion in the methods used to take the census. In the exercise of this discretion, the Census Bureau has determined that it cannot take the most accurate and cost effective Census possible without a limited, judicious use of sampling. The Bureau proposes to use sampling in Census 2000 as a complement to traditional methods used in enumeration, not as a substitute for these methods.

The Constitution requires that an "actual Enumeration" be conducted every ten years "... in such Manner as [the Congress] shall by Law direct." The actual enumeration requirement is not a requirement to conduct a headcount or physical enumeration. Courts

that have considered this issue have unanimously concluded that actual enumeration means that the decennial census must be as accurate at that time as possible, without reference to the specific method that is used.<sup>6</sup>

The Census Act, Title 13 of the United States Code, is the statutory vehicle through which Congress delegated responsibility for conducting the Census to the Secretary of Commerce. Section 141(a) requires the Secretary to take a decennial Census "in such form and content as he may determine, including the use of sampling procedures and special surveys. . . .", while Section 195 mandates that the Secretary "shall, if he considers it feasible, authorize the use of ... sampling . . ." except "for the determination of population for purposes of apportionment of Representatives." Courts have held that these provisions, taken together, evidence Congress' intention that sampling may be

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<sup>6</sup> *Young v. Klutznick*, 652 F.2d 617 at 625 (6th Cir. 1981) ("[A]lthough the Constitution prohibits subterfuge in adjustment of Census figures for purposes of redistricting, it does not constrain adjustment of Census figures if thoroughly documented and applied in a systematic manner."); *City of New York v. U.S. Department of Commerce*, 739 F. Supp. 761 at 767 (E.D.N.Y. 1990), rev'd, 34 F.3d 1114 (2nd Cir. 1994), 116 S. Ct. 1091 (1996), ("It is no longer novel, or in any sense new law to declare that statistical adjustment of the decennial Census is both legal and constitutional . . ."); *Carey v. Klutznick*, 508 F. Supp. 404 at 415 (S.D.N.Y. 1980) ("It appears to the Court that [the Constitution's requirement for an actual enumeration] indicates an intent that apportionment be based on a Census that most accurately reflects the true population of each state."); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 at 679 (E.D. Penn. 1980) ("[I]t is inconceivable that the Constitution would require the continued use of a headcount in counting the population.").



used in a decennial Census so long as it is not a substitute for traditional methods of numeration.<sup>7</sup>

In 1994, DOJ specifically approved the Census Bureau's plan to use sampling in Census 2000, agreeing with the logic contained in the long line of court decisions holding that neither the Constitution nor the Census Act prohibits adjustment:

[I]n requiring an 'actual' enumeration, the Framers meant a set of figures that was not a matter of conjecture and compromise. . . . There is no indication that the Framers insisted that Congress adopt a 'headcount' as the sole method for carrying out the enumeration, even if later refinements in the metric of populations would produce more accurate measures. . . .

. . . [T]he Census Act does not preclude the Bureau from engaging in statistical adjustments of the next set of decennial Census figures. . . . Its prohibition on 'sampling' in decennial Censuses appears to have

<sup>7</sup> *City of New York v. U.S. Dept. Of Commerce*, 34 F.3d 1114 at 1125 (2nd Cir. 1994), rev'd on other grounds, 116 S. Ct. 1091 (1996) ("statistical adjustment to the initial enumeration is not barred by the Census Act and indeed was meant to be encouraged."); *Carey v. Klutznick*, 508 F. Supp. 404 at 415 (S.D.N.Y. 1980) ("the Census Bureau [is authorized by § 195 to] . . . utilize sampling procedures but only in addition to more traditional methods of enumeration."); *Young v. Klutznick*, 497 F. Supp. 1318 at 1335 (E.D. Mich. 1980) rev'd on standing, 652 F.2d 617 (6th Cir. 1981) ("All that § 195 does is prohibit the use of figures derived solely by statistical techniques. It does not prohibit the use of statistics in addition to the more traditional measuring tools to arrive at a more accurate population count.").

meant only that while a procedure relying on 'sampling' alone might be the most cost-effective means to discover the information sought in a mid-decade Census, the Bureau should not rely on 'sampling' as its *exclusive* method of tabulating population figures in the decennial Census. . . .

This 1994 opinion is in accord with earlier DOJ opinions holding that the Department of Commerce could have adjusted the 1980 and the 1990 Censuses, had it determined that adjustment was feasible and proper.

Finally, some have contended that being counted in the census is like voting, and each individual can decide for him or herself whether to participate in the political process by being counted. This argument not only fails to recognize that children under the age of 18 accounted for more than half of the undercount in 1990, but also fails to comprehend the Census Bureau's constitutional mandate. Article I, Section II of the Constitution, as amended by the Fourteenth Amendment, commands that representatives be apportioned based on the "whole number of persons in each State", not the number of persons in each state who choose to participate in the political process. The apportionment situation at the time the Constitution was adopted makes clear that the Framers' intent was to count all living persons in the United States, not all voters or all citizens. At the time the Constitution was adopted, women were not permitted to vote; children and slaves were in no position to "stand up and be counted." All were nonetheless enumerated for apportionment purposes, with slaves being counted as 3/5 of a person until passage of the Fourteenth Amendment in 1868. The Constitutional command to the Census Bureau is

clear—to secure the most accurate enumeration possible of all persons regardless of status, so that Congress can reapportion itself fairly. The Census Bureau's goal is to find and enumerate all persons resident in the United States on Census Day, 2000.

The legal authorities are clear—neither the Constitution nor the Census Act precludes the use of sampling. The Census Bureau, following the Congressionally-mandated recommendations of the National Academy of Sciences, has determined that Census 2000 would be rendered more accurate and more cost-effective by the introduction of a limited use of sampling in addition to a traditional methods of enumeration. The Supreme Court has held that the Census Bureau enjoys broad discretion in the methods it uses to take the census. The decision to use sampling as planned in Census 2000 is a rational decision and falls well within this discretion.

## **GLOSSARY OF TERMS**

### **Computer Assisted Telephone Interviewing (CATI)**

A method of data collection using telephone interviews in which the questions to be asked are displayed on a computer screen and responses are entered directly into the computer.

### **Data Access and Dissemination System (DADS)**

A generalized electronic system for all access and dissemination of Census Bureau data. This interactive electronic system will be designed to allow efficient and cost-effective access to data summaries generated by the various censuses and other programs of the Census Bureau. DADS will serve as the vehicle for accessing and disseminating data from Census 2000 and from the American Community Survey.

### **Demographic Analysis (DA)**

Demographic Analysis is one of the methods the Census Bureau uses to measure coverage at the national level. It differs from survey coverage estimates, such as PES and ICM, in that it does not rely on case by case matching of census records. To produce an estimate of the total population, DA relies on administrative records to provide estimates of births, deaths, immigration, and emigration. DA provides estimates on the national level only.

### **Dual System Estimation (DSE)**

The estimation methodology used for Integrated Coverage Measurement.



### **Geocoding**

The assignment of an address, structure, key geographic location, or business name to a location that is identified by one or more geographic codes.

### **Group Quarters**

A facility where people live that is not a typical household-type living arrangement. The Census Bureau classifies all individuals not living in households as living in group quarters. There are two types of group quarters: institutional (for example, correctional facilities, nursing homes, and mental hospitals) and noninstitutional (for example, college dormitories, military bases and ships, hotels, motels, rooming houses, group homes, missions, shelters, and flophouses).

### **Heterogeneity**

Heterogeneity occurs when blocks of housing units assigned to sampling strata or groupings are not similar in terms of the likelihood of being included or missed by the census. Heterogeneity creates difficulty for the small area estimation process because the correction factor gets applied to all people with the specified characteristic in that sampling poststratum, even though some of them do not actually have the coverage characteristics.

### **Homogeneity**

The assumption of homogeneity expects that all people in a particular sampling stratum or grouping will be very much alike in terms of their likelihood of being included or missed by the census. The grouping of

people in a particular stratum is called poststratum, such as all white, non-Hispanic male renters ages 18-22 in a rural area. A lack of homogeneity in a particular sample block is not an error, but it does create difficulty for the small area estimation process. This happens because the correction factor gets applied to all people with the specified characteristic in that poststratum, even though some of them do not exhibit the same coverage characteristics.

### **Housing Unit**

A housing unit is a house, an apartment, a mobile home or trailer, a group of rooms, or a single room occupied as a separate living quarters, or if vacant, intended for occupancy as a separate living quarters. Separate living quarters are those in which the occupants live separately from any other individuals in the building and which have direct access from outside the building or through a common hall. For vacant units, the criteria of separateness and direct access are applied to the intended occupants whenever possible.

### **Imputation**

When information is missing or inconsistent, the Census Bureau uses a method called imputation to assign values. Imputation relies on the statistical principle of "homogeneity," or the tendency of households within a small geographic area to be similar in most characteristics. For example, the value of "rented" is likely to be imputed for a housing unit not reporting on owner/renter status in a neighborhood with multi-units or apartments where other respondents reported "rented" on the census questionnaire. In past censuses, when the occupancy status or the

number of residents was not known for a housing unit, this information was imputed.

### **Integrated Coverage Measurement (ICM)**

A coverage measurement methodology that will be used to determine the number of people and housing units missed or counted more than once in Census 2000. This information is combined with the initial data collection results before producing a single set of official census results (the one-number census).

### **List/enumerate**

A method of data collection in which temporary field staff, called enumerators, list each residential address, spot the location of each on a census map, and interview the residents of the household during a single visit. This completes the census address list for these areas and provides the information needed to update the TIGER data base and Master Address File (see definitions below).

### **Local Update of Census Addresses (LUCA)**

A Census 2000 program, established in response to requirements of P.L. 103-430, that provides an opportunity for state, local, and tribal governments to review and update individual address information in the MAF and associated geographic information in the TIGER data base before using the addresses for questionnaire delivery to improve the completeness and accuracy of both computer files and the census.

### **Master Address File (MAF)**

A computer file based on a combination of the addresses in the 1990 census address file and current versions, supplemented by address information provided by state, local, and tribal governments. The MAF is being updated throughout this decade and the next to provide a basis for creating the Census 2000 address list, the address list for the American Community Survey, and the address list for the Census Bureau's other demographic surveys.

### **Nonresponse Follow-up**

A census follow-up operation in which temporary field staff, known as enumerators, visit addresses from which no response was received.

### **Nonsampling error**

Errors that occur during the measuring or data collection process. Nonsampling errors can be the most serious types of errors because they yield *biased* results when most of the errors distort the results in the same direction. Unfortunately, the full extent of nonsampling error is unknown. Decennial censuses traditionally have experienced nonsampling errors, most notably undercount, resulting from people being missed in the enumeration processes.

### **Post-Enumeration Survey (PES)**

The 1990 Post-Enumeration Survey (PES) was designed to measure net coverage errors in the 1990 census. The PES evaluated coverage in the 1990 census



on a case-by-case basis using the Dual System Estimation (DSE) methodology.

#### **Poststratum**

Information about the current occupants of each housing unit in the ICM survey found *during* the ICM interview, is used to form groupings called "poststrata." This information, including the age of respondent, current owner/renter status, and so forth, is used to form homogenous groupings and improve the estimation process. By contrast, the initial ICM strata will be formed using aggregate information about each block as of the 1990 census.

#### **Program for Address List Supplementation (PALS)**

A program providing all governmental units and regional and metropolitan agencies the opportunity to submit lists of individual addresses for their community to the Census Bureau for use in building the MAF. Ongoing submissions and feedback between the Census Bureau and local governments on this program, enabled by the Census Address List Improvement Act of 1994 (P.L. 103-430) will help ensure the completeness and accuracy of the MAF and the TIGER data base.

#### **Quality Assurance (QA)**

Quality assurance represents a broad philosophy and specific procedures that are designed to: build quality into the system, constantly improve the system, integrate responsibility for quality with production.

#### **Sampling Error**

Errors that occur because only part of the population is being contacted directly. With any sample, differences are likely to exist between the characteristics of the sampled population and the larger group from which the sample was chosen. However, sampling error, unlike nonsampling error, is readily measured.

#### **Service-based enumeration (SBE)**

An operation designed to enumerate people at facilities where they might receive services, such as shelters, soup kitchens, health-care facilities and other selected locations. This operation targets the types of services that primarily serve people who have no usual residence.

#### **Special Place**

An institution that includes facilities where people live or stay other than the usual house, apartment, or mobile home. Examples are colleges and universities, nursing homes, hospitals, and prisons. Often the facilities that house people are group quarters, but they may include standard houses or apartments as well.

#### **Sampling Stratum**

A sampling stratum, as used in the ICM, is a grouping or classification that have a similar set of characteristics, based on the 1990 census. For example, one might define a stratum as: all blocks in large central cities with a 1990 census population that was 30 percent or more Black renters.

### **Topologically Integrated Geographic Encoding and Referencing (TIGER)**

A computer data base that contains a digital representation of all census-required map features (streets, roads, rivers, railroads, lakes, and so forth), the related attributes for each (street names, address ranges, etc.), and the geographic identification codes for all entities used by the Census Bureau to tabulate data for the United States, Puerto Rico, and the Island Areas. The TIGER data base records the interrelationships among these features, attributes, and geographic codes and provides a resource for the production of maps, entity headers for data tabulations, and automated assignment of addresses to a geographic location in a process known as "geocoding."

### **Telephone Questionnaire Assistance (TQA)**

A toll-free service that will be provided by a commercial phone center to answer questions about Census 2000 and the Census 2000 questionnaire, and to take interviews from people who prefer to be interviewed over the telephone.

If you want a copy of any of the following reference materials, please call the Census Bureau at (301) 457-2131.

Modernizing the U.S. Census, National Research Council, 1995

Preparing for the 2000 Census, Interim Report II, National Research Council, Committee on National Statistics, 1997

Census 2000 Operational Plan, U.S. Bureau of the Census, 1997



United States  
CENSUS  
2000

**Census  
2000  
Operational  
Plan**

April 1998 (Revised)  
U.S. Department of Commerce  
Economics and Statistics Administration  
BUREAU OF THE CENSUS

**CENSUS 2000 OPERATIONAL PLAN**

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*The Census 2000 Operational Plan is subject to change based upon Congressional funding and questionnaire content changes, the results of our testing and research, the advice generated from our ongoing consultation process with stakeholders, and on what occurs as we begin operationalizing and implementing the plan's specific elements.*

APRIL 1998



United States  
CENSUS  
2000

**Section I.  
Objectives and  
Strategies**

**CENSUS 2000 OPERATIONAL PLAN**

**I. OBJECTIVES AND STRATEGIES**

The next census of the United States' population and housing will be conducted as of April 1, 2000. Reflecting a long tradition, Census 2000 will be the 22nd decennial enumeration in an unbroken chain that our Nation has undertaken. In many significant respects, however, Census 2000 will deviate sharply from tradition. As this Nation moves forward into a new century, the decennial census also must move forward. The Census Bureau has developed a plan for conducting Census 2000, incorporating many new features that address the two concerns that many people had about the 1990 census: that it cost too much and that it did not include everyone. The Census 2000 operational plan redesigns the census process in bold and fundamental ways.

From apportioning the U.S. House of Representatives to providing the data used by communities, businesses, and Americans everywhere, the decennial census is the cornerstone of our knowledge about our Nation. The census is the only data gathering operation in the United States that is mandated by the Constitution and the only one that produces a broad array of information on the American people and their housing at the smallest geographic levels.

**Objectives of Census 2000**

*The goal of every census is to be the best census ever. So it is with Census 2000. The Census 2000 operational plan contains strategies to improve the completeness and reduce the cost of the census. The following objectives are fundamental to our efforts:*

- Make unprecedented efforts to count every household and person—from simpler, user-friendly forms to the better design of census operations
- Maintain an open process that diverse groups and interests can understand and support
- Eliminate the differential undercount of racial and ethnic groups
- Produce a “one-number” census that is right the first time

#### **Four Strategies for Fundamental Change**

*The Census Bureau's operational plans for Census 2000 are built around four fundamental strategies for change:*

- *Strategy One: Build Partnerships at Every Stage of the Process*

The Census Bureau cannot accomplish its goals alone. So for Census 2000, we are reaching out and forming partnerships to help us accomplish our objectives. We need to think in terms of every activity being done by a “best in class” provider. This means the Census Bureau must build:

- **Partnerships with state, local, and tribal governments.** These governments know their local conditions and circumstances better than the Census Bureau. They can help us correct our maps and address lists, and tell us where to put unaddressed questionnaires, called “Be Counted” forms, in locations where people will find them. They also can alert us to problems and advise us of opportunities to publicize Census 2000. The law now allows us to let these

governments review our address lists—while maintaining their confidentiality—and get their input.

- **Partnerships with community groups.** These groups know their constituents better than either the Census Bureau or any other governmental office. The groups can alert us to the best ways to communicate with their constituents to ensure they are included.
- **Partnership with the U.S. Postal Service (USPS).** For Census 2000, the Census Bureau will use address information provided by the USPS to enhance our comprehensive address file. The USPS also will deliver census questionnaires to over 80 percent of the addresses nationwide.
- **Partnership through privatization.** To be “world class” in every stage of the census, we will award contracts to private sector partners, including:
  - **Advertising and promotion.** We will use private companies to manage our efforts to promote the census more visibly and effectively.
  - **Facilities management.** We will contract with data processing companies to manage the facilities where completed census forms are translated into computer files.
- *Strategy Two: Keep It Simple*  
The simpler and easier Census 2000 is, the greater the response, and the more accurate and less expensive it will be. Simplicity is the goal for every part of the process. For example:



- **User-friendly forms.** Our modern, powerful computer systems will allow us to use forms that are easier to read and complete. Moreover, because everyone is deluged with junk mail, Census 2000 questionnaires must be attractive, motivating (by explaining the benefits and mandatory nature of the census), easy to understand, and simple to fill out. The Census 2000 forms will stand out because they will carry a well-publicized "census" identity. Private designers are working with us to simplify the forms and implement the user-friendly features demonstrated in our testing and research to increase response.
- **Multiple contacts.** We also have learned from our testing and research that repeated contacts and reminders pay big dividends in response rates. So for Census 2000, we will implement a multiple mail contact strategy. The first contact with each address will be a letter that alerts the recipient to the census and its benefits. A few days later, a census questionnaire will arrive, noting that "your response is required by law." Shortly thereafter, a postcard will arrive thanking those who have participated and reminding others to do so.
- **More ways to respond.** Our first priority is to deliver a census questionnaire at each address. For the first time, however, we also will place unaddressed Be Counted questionnaires in locations such as community centers, Walk-in Questionnaire Assistance Centers, tribal offices, etc., for pick up and completion by people who believe that they have not been counted in the census. There will be a well-publicized toll-free telephone

number for respondents to respond on the telephone. We also plan to mail census forms in another language to households in areas where a significant number of people speak the other language, along with an English-language questionnaire.

- **Other simplified procedures**

- A new method will ensure that Census 2000 finds people—such as those with no usual residence—at shelters, soup kitchens, and other places where they obtain services.
- Special targeted methods will improve the count for population groups and in areas that historically have had large undercounts. One example is enlisting community leaders to designate neighborhoods where English is not the primary language for the Census Bureau to include as part of the targeted initial mailing of non-English questionnaires.
- **Strategy Three: Use Technology Intelligently**  
Dramatic advances in computing will allow Census 2000 to be simpler, less costly, and more accurate. For example:
  - **Digital "capture" of forms.** In Census 2000, for the first time, we will scan most of the completed questionnaires directly into computers that read handwriting. The completed forms will be read directly into computer files that will be used later for tabulation.
  - **"Matching" software.** Sophisticated computer software will allow us to spot multiple responses from the same household. For example, if one

spouse returns a regular questionnaire by mail while the other fills out a Be Counted questionnaire, we will be able to determine that both records come from the same household.

- **"Point and click" data tabulation.** Data seekers will be able to find the information they want from Census 2000. "Point and click" computing from our new DADS system will allow them to select the specific information they want, instead of thumbing through census reports that may or may not have the answer they are looking for.

- **Strategy Four: Use Statistical Methods**

Sampling and statistical estimation have been an integral part of the census process since 1940. At one time, the census asked every household for all the census information; now, most census questions are asked of a sample of households.

In 1990, respondents who did not return their census forms by mail cost the Census Bureau more than those who did, since temporary census workers were needed to conduct personal visits with nonresponding households. Statisticians agree that incorporating widely accepted statistical methods into Census 2000 will produce better results at less cost. So for Census 2000, we will make every attempt to find everyone. Some households, however, will neither mail in nor phone in their response. So we will use personal visits to obtain responses from the remaining addresses, to ensure that we directly contact at least 90 percent of the households in each census tract.

Using sampling to gather information on nonrespondents will ensure that Census 2000 is built on a solid core of responses. It will ensure that we can complete

our personal visits with no loss of accuracy but with substantial savings of time and money. Sampling will allow us to make scientific estimates of the population for the final 10 percent of the housing units.

Our experience in the last six decennial censuses has demonstrated that having responses from 100 percent of the housing units does *not* ensure inclusion of 100 percent of the population. People are left out for many reasons, and our objective is to account for everyone.

To check the quality of our work and to reach our goal of accounting for 100 percent of the population, we will take an independent sample—of about 750,000 housing units—of the total population and conduct a second interview. We will use the information from the second interview as the basis for quality checking all our results: the results from the mail returns, the Be Counted program, telephone interviews, and personal followup visits. This quality check survey, also known as the Integrated Coverage Measurement Survey (ICM), will lead to a "one-number" census and will eliminate the need for subsequent adjustment of the decennial count. We will use demographic analysis to validate the results.

By using both kinds of sampling—that is, sampling for nonresponse and for the ICM survey—the accuracy of Census 2000 will be very high for all states, congressional districts, and other populous areas.

There always will be some uncertainty surrounding population totals for some smaller areas, such as census blocks, census tracts, or small communities. Unlike previous censuses, for Census 2000, we will have estimates of the uncertainty resulting from



sampling for all areas. The totals for historically undercounted areas will be much better than those obtained from using traditional methods.

#### **Effective Management Tools**

The Census Bureau has instituted several management initiatives—such as the following—to facilitate a more effective and efficient planning process for Census 2000 as well as its actual implementation:

- A sophisticated electronic Management Information System, with a Master Activity Schedule component and a Cost and Progress component, will provide information on scheduled dates, responsible organization, budget, cost to date, and current progress for Census 2000 operations. This system provides decision support functions, such as critical path analysis and what-if analysis.
- The Commerce Administrative Management System is a modern electronic financial management system which, among other features, provides up-to-date financial data available for on-line query as well as paperless processing for purchase orders and payments.
- The Census 2000 Cost Model provides an automated means to estimate staffing and budget requirements for Census 2000 based on a well-defined set of activities specific to the major components of census operations. The Cost Model tool used to prepare the cost estimates for the budget process. It also is used to answer inquiries from Congress, the Department of Commerce, the Office of Management and Budget, senior managers at the Census Bureau, and our stakeholders.

Using the various innovative and cost-saving methods that center around the four strategies for conducting Census 2000, as well as the improved management of census operations, cost modeling techniques have estimated the cost of Census 2000 to be less than if the 1990 census design were repeated in 2000.

United States  
CENSUS  
2000

**Section II.  
Content of  
the Report and  
Overview of  
Census 2000  
Operations**

**II. CONTENT OF THE REPORT AND OVERVIEW OF  
CENSUS 2000 OPERATIONS**

**CONTENT OF THIS REPORT**

This report presents the objective, major features, and milestone dates for each major element of the operational plan for Census 2000. The milestone dates shown in each section are presented in terms of months of the calendar year and, sometimes, in terms of exact days. Questions or comments relating to specific aspects of the operational plan may be directed to the appropriate person listed in Appendix B, "Key Census Bureau Telephone Contacts."

The census design upon which this plan is based employs statistical sampling to supplement traditional enumeration methods while improving quality and containing census costs. In addition to continued planning and preparation for the current census design, the Bureau of the Census is designing a Census 2000 process that does not employ the expanded statistical methods. The detailed plans for this "non-sampling" census will be documented as they become available.

**OVERVIEW OF CENSUS 2000 OPERATIONS**

**CURRENT STATUS**

Census 2000 will enumerate the residents of the United States as of April 1, 2000. Since the first census in 1790, the major phases of the census—planning and preparation, data collection and processing, and dissemination of results—have remained the same. Over time, however, the operational components of these phases have changed greatly. Changes have reflected the characteristics of our society, advances in technology and methodology, and experience gained in previous censuses. This overview describes major elements



of the preparatory, data collection, data processing, and dissemination phases of the *current design* of Census 2000. Figure II-1 depicts the key operations in each of these phases. The bottom layer of blocks shows activities comprising the preparatory phase, which provide a broad and firm foundation for effectively supporting successive steps in the census process. The next set of blocks shows major data collection activities, and the third layer represents data processing steps, including the capture of information provided by the public. The top block shows the data dissemination phase, representing the goal of producing statistics that will serve our Nation well.

## Figure II-1. Census 2000 Process

(CHART OMITTED)

The design of Census 2000 reflects a balance between two different approaches to assuring a complete enumeration of the population:

- One is the "traditional" approach used in all previous censuses. The traditional approach is to count each person, household, and housing unit by direct contact to the greatest extent possible. For Census 2000, we have intensified our efforts to encourage participation by expanding and improving ways for everyone to become aware of the census and provide information about themselves and their households.
- The second approach is to use statistical methods, especially sampling, to a greater degree than in past censuses. These statistical methods will address problems with the timing and accuracy of past censuses that will not be solved even with expanded efforts using traditional methods.

The current census design uses the traditional approach for the first several weeks of the enumeration process, and then turns to the second approach to compensate for deficiencies in the first. The operations described in this document have been defined, planned, funded and scheduled to integrate these two approaches and result in the single set of results that characterize the "one-number" census.

The remainder of this section provides an overview of the preparatory, data collection, data processing, and dissemination phases of the current design of the Census 2000. It provides a context for the remainder of the document by showing how each major element of the census relates to others. As each individual element is

described, we provide a reference to the subsequent section in this plan which provides more detail about it.

This overview first summarizes operations conducted during the data collection, data processing, and tabulation phases of the census. Having provided the context of those activities, it then describes the preparatory phase of the census, where the foundation of the other phases is laid.

### ***DATA COLLECTION, DATA PROCESSING, AND DISSEMINATION***

The major enumeration activities for the Census 2000 occur between April and September. Throughout the period of data collection, there is a parallel period of data processing where the information is entered into the computer and checked. These data processing activities support enumeration by identifying areas where information is missing or incomplete. Once data collection is complete, data processing continues to assure the accuracy of the census results. The final product from data processing is complete files of characteristics for each person in the nation and for enumerated housing units. Tabulations from these files are used to produce census results that will be used for many purposes.

### ***BASIC DATA COLLECTION***

Just before April 1, 2000, most of the households in the United States will receive a questionnaire on which their residents will be enumerated in the census.

- For just over 80 percent of all households, the United States Postal Service (USPS) will deliver census questionnaires. Household residents will be asked to fill out their questionnaire and mail it back to the Census Bureau. This procedure,



known as **mailout/mailback** (See section IX.A), covers most areas that have city style addresses (a house number and street name).

- For the vast majority of the remaining households, a census worker will leave the questionnaires, while updating the list of addresses for the area. This procedure is known as **update/leave**. (See section IX.A) Again, household residents will be asked to fill out the questionnaire and mail it back to the Census Bureau.
- In the remaining areas, which are sparsely settled or remote, census workers collect information directly. These **list/enumerate** procedures are described further in section IX.A.
- Additional or modified procedures are used to ensure the complete enumeration of particular persons and areas:
  - Modified procedures are used to enumerate persons in special living situations. These procedures are described in sections IX.D and IX.E.
  - Various special procedures will also be used in areas where extra effort to complete the enumeration is needed. These procedures are described in section IX.F.
  - Basic census procedures will be tailored to conduct the best possible enumeration of American Indian and Alaska Native Areas and in Hawaiian Homelands. Planning for all aspects of the census in these areas is described in section X.

- Slightly different procedures are used in Puerto Rico and the Island Areas. These procedures are referenced in sections XIV. and XV, respectively.

As questionnaires are returned by mail or by census workers, they will be checked-in against the list of those sent out. The handwritten information on the forms will be converted to computer-readable form, and the data will be checked by computer to determine whether we received information for all persons in the household. We will attempt to contact households where one or more persons, or their data, may be missing. These contacts, by mail or telephone, are described in Sections IX.H and IX.J, respectively.

During the period of time when questionnaires are being returned, we will provide opportunities for people to be counted if they feel they did not receive a questionnaire, or that they were not included on their household's questionnaire, or that they would not otherwise be counted for any reason. These opportunities are greatly expanded and intensified compared to previous censuses, where we assumed that everyone would receive a census questionnaire in the mail and be enumerated with an appropriate household. For Census 2000, people will be able to pick up a "Be Counted" census form (See section X.C) in a convenient location and mail it back to us. In addition, they will be able to use our Telephone Questionnaire Assistance service to answer questions about filling out the form, or to provide their information over the phone. (See section IX.B) We will inform the public about these opportunities through a strong marketing campaign and a network of partnerships established with community organizations; state, local, and tribal governments; and

others that can help encourage their constituencies to participate in the census.

#### *SAMPLING FOR NONRESPONSE AND THE VACANT HOUSING UNIT CHECK*

Even with our unprecedented efforts to encourage everyone to provide information by mail or telephone, some persons and households will not do so. About 2 weeks after Census Day, we will determine the percentage of returned questionnaires (the mail response rate) for each census tract. We will then select a sample of addresses without returned questionnaires and send census workers out to visit and enumerate at those addresses. This operation is called Nonresponse Followup. (See section IX.K) The rate at which the sample is selected will ensure that at least 90 percent of the housing units in the tract have completed census forms.

During the time period between Census Day and visits to the sample of nonresponding addresses, census workers visit a sample of those housing units identified by the Postal Service as likely to be vacant. This operation is called the Vacant Housing Unit Followup. (See section IX.G) Past experience shows that a small but significant portion of these units are, in fact, occupied, so this visit accounts for people who may be living there and who did not get a census questionnaire.

#### *INTEGRATED COVERAGE MEASUREMENT*

Up to this point, we will have used all available methods to encourage people to participate in the census. Subsequently, we will have visited a sample of nonresponding households to collect information that can be used to estimate the number and characteristics of persons of all persons who would have been followed up

under previous census procedures. However, as in past censuses, there will still be significant numbers of persons who are not represented in the census enumeration. These are people with unusual living situations, transient status, or other characteristics for whom even expanded enumeration opportunities fail to work. Because we know that people will still be missing, we will conduct an additional major check for quality called the Integrated Coverage Measurement (ICM) Operation. (See section IX.L) The ICM is a large-scale sample survey conducted independently of earlier census operations. By matching the results of the ICM to the results of those earlier operations, we will provide an estimate of the total population of the nation that is more complete than either. The ratio of the estimate of the complete population to the results of the earlier operations will be calculated for various population groups to produce a sound statistical estimate of the population for the Nation, States, and for small areas.

Because the final "one number" census results are statistical estimates, they may differ from what they would have been if we had been able to enumerate each person directly. We will provide estimates of their coefficient of variation (CV), a measure which indicates the amount of difference that has occurred. The effects of combining the responses to the census, the data from the nonresponse followup, and data from the ICM are described in section IX-M. Independent estimates that can be used to validate the "one number" census results will be provided from an approach called Demographic Analysis. (See section IX.N)



### DATA PROCESSING

As described above, the information supplied by respondents will be entered into computers concurrent with field operations. The data are then processed to assure their accuracy and completeness. For example:

- The computer will check each questionnaire to determine if there is any indication that one or more persons may be missing. Whenever there is such an indication, we will follow up by mail or telephone to add people as appropriate.
- When we receive Be Counted forms in the mail or census information over the phone, we will compare (match) that information to the information on mail returned questionnaires to make sure that people are not counted more than once. (See section IX.I)
- Computer checks are also done to determine how complete the data for each person are. These edits locate questionnaire items with missing data and use statistical techniques to "impute" values based on characteristics of similar households.

All of these operations help ensure that there is one record for each person in the census, and that their data records are complete.

Another set of processing operations ensures the integrity of the list of addresses and the housing units associated with them. There are several census operations that identify needed changes to our list of addresses. Whenever we identify new housing units or those that no longer exist, we must update our files. Processing these changes is a continuing operation involving data capture of changed addresses and locations and, if needed, changes to our geographic database.

### DISSEMINATION

Once the final population counts have been processed, we are ready to provide the data. The first set of data produced from the census are the state totals to be provided to the President by December 31, 2000. These counts are used to reapportion the seats in the U.S. House of Representatives. Between that date and April 1, 2001, we will provide tabulations to each state so that they can redraw Congressional, state, and local legislative districts. The boundaries of areas for which redistricting data are provided are identified through partnerships with state officials, an effort that begins several years before Census Day. (See section XII.B)

Most of the data from the census will be tabulated and disseminated electronically using the newly-developed Data Access and Dissemination System (DADS). (See section XII.A) This system will use new technology to provide fast and flexible access to census data for a wide array of data users. In addition to tabulations, we will provide a full range of maps and other geographic products in hardcopy and digital form. (See section XII.C)

### PLANNING AND PREPARATION

The previous section summarized the activities that take place to enumerate the population and produce census data. To ensure their accomplishment, there is a lengthy and complex period of preparing for all of the people, systems, and materials needed to make the census successful. Long before Census Day, we need to:

- *Promote awareness of the census and its importance because the success of the census depends greatly on the cooperation of the American public. Our unprecedented efforts to promote and publicize*

the census include working with the media, state and local governments, and organizations who can encourage their constituents to participate. A paid advertising campaign will be coupled with a variety of special targeted activities to make as many people as possible aware of the importance of the census and the many ways of providing their information. Our partnerships with governments and organizations recognize their expertise about the best ways to involve the people they serve. (See section IV)

- *Determine the questions that will be asked of each person for themselves, other household members, and their living quarters (See section V.A) and design the questionnaires so that they will provide accurate and complete information.* We need to arrange for the questionnaire packages, including envelopes, to be printed, assembled, and delivered by the United States Postal Service or census workers on a precise schedule. To encourage as many households as possible to return their questionnaires, we will also send an advance notice of the census before the questionnaires are mailed, and a thank you/reminder postcard shortly after the questionnaires are mailed. (See section V.B)

In 2000, as in every census since 1940, a sample of households will be asked to respond to more questions than other households. Most households will receive a "short form," but this sample will receive the "long form." The sampling rate will vary across different geographic levels, with about one out of every six households receiving the long form overall. (See section V.D)

In addition to the census questionnaires and mailing packages, a number of other data collection forms must

be designed, produced, and provided to support special data collection efforts. (See section V.C)

- *Compile lists of addresses and other identifying information about housing units and other places where people live or could live.* Different procedures to compile address lists are used in areas where the United States Postal Service delivers the questionnaires and areas where census workers deliver them. (See sections VI.A and VI.B, respectively). Once compiled, all of these addresses form the Master Address File (MAF), which must be complete and accurate to help assure that the census results are complete and accurate. For both types of areas, the process of compiling the lists of addresses begins long before Census Day, and several phases of updating take place using information from the United States Postal Service, local and tribal governments, and census workers. (See sections VI.C., VI.D, and VI.E, respectively) Each of these sources provides unique and important contributions to the accuracy of the information on the address lists. Equally important, a unique location description must be associated with each address. These locations are important so that census workers can find addresses during field visits, and so that data provided by respondents in multiple ways, as well as the results of the Integrated Coverage Measurement Survey, can be matched efficiently. In areas with city style addresses, the address itself provides a unique location description, but in other areas, a person must visit the living quarters and describe it in words and by "spotting" it on a map.

Our tool for identifying the spatial location of living quarters and the other geographic information



necessary for producing maps and census tabulations is a data base called TIGER®\*. (See section VII) The TIGER data base, which accounts for the entire area of the country, initially was developed during the 1980's and is updated continually. It contains information on physical features including their names and attributes (for example, the address range associated with a street segment), the boundaries of legal, administrative, and statistical geographic entities, and other relevant data. Using the TIGER data base, we can associate each address in the Master Address File with its corresponding record in TIGER to produce address files or listings and accompanying maps for use in census operations and to tabulate the census results. Throughout the decade and especially during the census, the address list and the TIGER data base are linked and updated to ensure that both are kept current and consistent.

- *Establish an extensive set of temporary offices to support the conduct of data collection, data capture, and data processing operations.* Data collection offices and Data Capture Centers will manage the massive recruiting efforts needed to conduct census operation, report progress, and transmit completed work. Establishing the infrastructure for these offices requires long lead times in order to find and configure space; purchase equipment, furniture, and supplies; and recruit and train census workers for temporary positions. (See section VIII.A)

Precensus address listing operations will be managed by a network of Census Field Offices (CFO's), and data collection operations will be

managed by a network of Local Census Offices (LCO's). All of these offices will report to Regional Census Centers in the same cities where the Census Bureau's permanent Regional Offices are located. The decentralized networks of offices will be responsible for recruiting and managing staff for all field operations. Their establishment and management will be performed by Census Bureau staff.

Data Capture Centers will be located in four areas of the country, one of which is the Census Bureau's permanent data processing facility in Jeffersonville, Indiana. Permanent Census Bureau staff will establish and manage activities in Jeffersonville, which will perform both the same data capture functions as the other Centers and several post-census processing operations after the other Centers close. Responsibility for establishing and managing the other three Data Capture Centers, and for their equipment, software, and technical maintenance of equipment, will be contracted out. Contractors will be responsible for: (1) checking in census questionnaires by comparing identifying information on them to the Master Address File; (2) preparing the questionnaires for data capture; (3) capturing the data by scanning the questionnaires using electronic imaging; (4) keying of data as necessary; and (5) ensuring the consistency of data files with the actual respondent-supplied information. The completed capture files will be trans

\*TIGER® is a registered trademark of the U.S. Bureau of the Census. For ease of presentation, the trademark symbols for TIGER and TIGER-related products are omitted from the text.

mitted to headquarters for the operations needed to provide a final file of detailed census data. (See section XI.B)

Computer specialists at Headquarters, who work closely with statisticians and subject matter experts, will have designed an automated data processing system that supports preparatory activities, operates concurrently with capture operations during data collection, and processes the captured data. During the preparatory phases of the census, this system will support all activities related to building the address list and using the list for mailing questionnaires, selecting the sample of long form questionnaires, and providing control files for field data collection and data capture. During census data collection and capture operations, these headquarters processing systems will match and unduplicate responses for people who may otherwise be counted more than one time, and select the samples for non-response followup, the vacancy check, and the Integrated Coverage Measurement Survey. After data collection and capture, these systems will perform final edits to ensure complete information for and about each person, conduct statistical estimation and variance procedures, and format complete data files to be used to produce census results in a variety of media. (See section XI.C)

Recruiting temporary staff for census operations, in particular data collection, will require hiring almost a half million people for census jobs. Before hiring people, the Census Bureau will test them, make sure they meet other requirements, and screen them for criminal histories. (See section VIII.B)

Telephone Questionnaire Assistance will be performed under contract. The contractor will conduct operations to answer questions about the census questionnaire and take information from respondents over the telephone, under the direction of Census Bureau staff.

A sophisticated and extensive telecommunication network will support all communication among the public, our decentralized offices, and Headquarters. (See section XI.A)

Because the census must provide high quality information, it is critical that each operation that contributes to the accuracy of that information be performed well. Detecting and correcting errors that might otherwise be introduced is accomplished using Quality Assurance (QA) procedures. The operations for which QA procedures will be implemented are described in Section XIII.C.

- *Design a system to produce tabulations and other data products from the census.* Our first products will be the state counts for the President, and block level data for the states. We will work with data users to define other basic products, and are developing DADS for online timely access to all census data.



**TESTING, DRESS REHEARSAL, EVALUATION AND RESEARCH**

As mentioned earlier, we are conducting a Dress Rehearsal of Census 2000 methods and procedures during 1998. The design of the Dress Rehearsal was based on testing and research conducted earlier this decade to address problems identified in the 1990 Census. (See sections XIII.A and XIII.B) Continual improvement in the census process will again rely on Census 2000, which will include several studies to evaluate census quality and provide information for future census planning. (See section XIII.D.) In fact, planning for the 2010 Census has already begun, as described in Section XIII.G. Research and development efforts for 2010 will take advantage of the Dress Rehearsal and Census 2000 to provide a useful context for testing. For example, data from the Dress Rehearsal and Census 2000 (as well as other sources) will be used to explore the feasibility of using administrative records for a decennial census. (See section XIII.F) And, ideas for research studies and experiments to develop future census methods will be considered in planning the 2000 Census. In this way, the Census Bureau will continue its tradition of adapting census procedures to reflect our changing population, times, and technology.

United States  
CENSUS  
2000

**Section III.  
Legal  
Requirements**

### III. LEGAL REQUIREMENTS

The decennial census is mandated by the U.S. Constitution (Article I, Section 2) to provide the population counts needed to apportion the seats in the U.S. House of Representatives among the states. However, the Constitution does not prescribe how the decennial census should be conducted. In Title 13, U.S. Code, the Congress gave the Secretary of Commerce (and by delegation, the Director of the Census Bureau) discretion to enact decennial census plans, subject to executive and congressional review.

The planning and conduct of Census 2000 must comply with a number of legal requirements, some of which specify deadlines, as described in the following:

- The geographic scope of whom we enumerate in a decennial census is specified in Title 13 as covering the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, the Commonwealth of the Northern Mariana Islands, and Guam, and any other areas as may be determined by the Secretary of Commerce. In Census 2000, we also will enumerate the Pacific Island Area of American Samoa.
- The Secretary of Commerce, acting under the authority of Title 13, is required to report to the Congress twice regarding the content of the census questionnaires: first at least 3 years before Census Day (by April 1, 1997) on the subjects proposed for inclusion, and again at least 2 years before the census (by April 1, 1998) on the proposed specific question wording. Accordingly, on March 31, 1997, the Census Bureau submitted to the Secretary of Commerce for transmission to the Congress the list of

subjects proposed for inclusion in Census 2000. (See page V-4.)

- All subjects submitted to Congress had a strong legislative justification for being included. They were either specifically mandated or strongly implied by Federal law. Congress has enacted laws requiring the use of census data to determine how much Federal funding to allocate to states, cities, school districts, and other governmental units to administer a wide variety of important programs.
- On October 30, 1997, the Office of Management and Budget issued revisions to the standards for the classification of Federal data on race and ethnicity. This standard provides guidelines on how all Federal agencies are to collect, tabulate, and publish data on race and ethnicity. According to the standard, there are five categories for data on race: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or other Pacific Islander, and White. There are two categories for data on ethnicity: Hispanic or Latino and not Hispanic or Latino. Respondents can select one or more racial designations, and all Federal agencies are encouraged to report at a minimum a count of the number of respondents reporting "more than one race."
- Public Law (P.L.) 94-311 requires the use of Spanish -language forms and Spanish-speaking interviewers in areas having significant concentrations of Hispanic populations. In Census 2000, for the first time, we will include a Spanish-language census questionnaire along with an English-language form in the mailout package for these areas.



- Before the census forms go to print, the OMB is required by law to review the questions to ensure they meet the data needs of the Executive Branch departments and agencies responsible for implementing programs mandated and authorized by the Congress. In addition, under the Paperwork Reduction Act (Title 44), the OMB must see that the time burden for a household to respond to the questionnaire is held to a minimum.
- P.L. 103-430 requires that the United States Postal Service provide its address information to the Census Bureau to improve the Master Address File (MAF).
- Established in response to the requirements of P.L. 103-430, the LUCA program (Local Update of Census Addresses) provides an opportunity for local and tribal officials to designate a liaison to review the address information in the MAF for their jurisdiction and the geographic information in the Census Bureau's geographic database (TIGER) to improve their completeness and accuracy.
- As specified in Title 13, Census Day for Census 2000 is April 1, as it has been for each decennial enumeration since 1930. All census questions generally are to be answered with reference to April 1, regardless of when the questionnaire is filled out.
- Title 13 guarantees the confidentiality of respondents' answers to the census forms. In fact, the Census Bureau takes extraordinary steps throughout the entire census process to assure the confidentiality of census information. All Census Bureau employees must take an oath of confidential-

- ity. As required by Title 13, the Census Bureau maintains tight security over completed questionnaires. Furthermore, disclosure-avoidance programs during the data tabulation phase make certain that individual persons or housing units cannot be identified, either from paper or electronic tabulations.
- Title 44 specifies that individual census information from the decennial census cannot be made public for 72 years.
  - Under the terms of Title 13, the Secretary of Commerce must deliver state population counts to the President within 9 months of Census Day (by December 31, 2000). These counts are used to reapportion the seats in the U.S. House of Representatives.
  - P.L. 94-171 requires that the Census Bureau provide selected census tabulations to the states by April 1 of the year following the census year. The states use these tabulations to redraw the boundaries of Congressional districts as well as other areas used for state and local elections.
  - Under the Voting Rights Act, the Census Bureau is required to provide to the states race and ethnic data for small geographic areas to be used for the redistricting process specified in P.L. 94-171. The race and ethnic categories required are those mandated by the standards for the classification of federal data on race and ethnicity. (see page III-1).
  - P.L. 105-119 (also known as the "Department of Commerce and Related Agencies Appropriations Act, 1998"), Section 210, establishes a board known as the Census Monitoring Board. The function of

the board, as stated in the legislation, is "to observe and monitor all aspects of the preparation and implementation of the 2000 decennial census (including all dress rehearsals and other simulations of a census in preparation therefor)." The Board shall cease to exist on September 30, 2001. Section 209(j) of this same law also states that there should be sufficient funds "to plan, test, and become prepared to implement a 2000 decennial census, without using statistical methods, which shall result in the percentage of the total population actually enumerated being as close to 100 percent as possible."

United States  
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**Section IV.  
Marketing and  
Partnership  
Program**



#### IV. MARKETING AND PARTNERSHIP PROGRAM

##### OBJECTIVE

The Census 2000 Marketing and Partnership Program will be, for the first time, an integrated communications effort. The objectives of the campaign are to increase awareness of Census 2000 and boost response rates.

##### MAJOR FEATURES

Prior to Census Day, the Marketing and Partnership Program will be geared toward building awareness that the census is approaching and how it will benefit the community. During the mailout/mailback period, the campaign focus will shift to motivating people to return their questionnaires promptly to increase the initial mail response rate. The marketing program also will encourage cooperation with census enumerators during the followup operation with nonresponding households and will let people know the census is "not over" during the quality check survey.

The comprehensive marketing and partnership strategy includes:

- Partnerships and community outreach
- Paid advertising
- Special methods to encourage response
- Traditional public relations
- Special events

##### Partnerships and Community Outreach

The Census Bureau has begun forming partnerships with other Federal agencies, state, local and tribal governments, as well as with community-based organizations and businesses. The Bureau recognizes the unique local knowledge, experience, and expertise

these partners can bring to planning and taking an accurate census. Partnerships have each member performing those activities for which it is best qualified, assuring the most effective expenditure of staff and financial resources.

To establish and maintain continuing liaison and partnership with government and non-government entities, we will hire three types of Census Bureau partnership specialists throughout the country: government, media, and community specialists. The first wave of 12 government partnership specialists have been on board since 1996.

The Census 2000 Publicity Office will coordinate the full range of Census 2000 programs with governmental and nongovernmental partners to ensure that we do not make unnecessary or overlapping requests of those willing to work in partnership.

Census 2000 will provide numerous opportunities for government and nongovernment entities to participate in partnership activities. Examples of these activities include:

- The Census Bureau has formed a partnership with the U.S. Postal Service (USPS) to use its address information to enhance the Census 2000 Master Address File. Working with the USPS provides the best nationwide source of address updates, which will help reduce the number of households missed in Census 2000.
- Under the LUCA program (see page VI-5), partnerships with local and tribal governments are being formed to provide valuable assistance in reviewing and updating the Master Address File.

- Partnerships with governments and organizations will support Census 2000 promotional activities by issuing public statements of endorsement, holding press conferences, placing census articles in newsletters, including census messages in employee paychecks, sponsoring census promotional events, and posting census promotional material in agency facilities.
- Partnerships with local organizations will aid in recruiting candidates to apply for census office and field enumerator positions. Temporary jobs will be available in all geographic areas.
- Partnerships with community-based organizations and local and tribal governments will identify strategic and high visibility locations in the community to place unaddressed questionnaires, called "Be Counted" forms, for people to pick up and complete. These partners also will recommend locations for Walk-in Questionnaire Assistance Centers and for office space to test and train temporary census workers.
- During the enumeration period, partnership and outreach efforts will remind people of ways to respond if they did not receive a questionnaire. Mail response rates will be available so that outreach/partnership efforts can target slow mail response areas.

#### **Paid Advertising**

For the first time, a paid advertising campaign will be used for a decennial census. In designing the Census 2000 paid campaign, we have benefitted greatly from

the advice given by the U.S. military, the Postal Service, and private communications contractors, as well as from our own survey and focus group research. Young and Rubicam, Inc. and its partner agencies, Bravo, Mosaica, J. Curtis, Inc. and Grey and Grey Advertising, have been selected to conduct the 2000 campaign. The major components will include:

- A national media campaign, including TV (both broadcast and cable), radio, and print media, will be aimed at increasing mail response.
- Using national, regional, and local media outlets, the Young and Rubicam advertising agency will design and implement a flexible advertising effort directed at increasing mail response among targeted audiences, especially traditionally undercounted populations. The local effort will use, for example, community news outlets, posters, flyers, and mass transit advertising.

#### **Special Methods to Encourage Response**

- **Integrated mailing package.** For the first time, the mailing package design—including the questionnaires, envelopes, motivational slogans, and logo—will be wholly compatible and integrated into the design of the rest of the marketing plan.
- **Direct mail campaign and mail strategy.** To increase questionnaire mail response, the Census Bureau will use a new strategy that will focus on multiple mail contacts with respondents, including mailing respondents an advance notice letter, an initial questionnaire and a thank you/reminder postcard.
- **Other ways to respond.** Also for the first time, special unaddressed questionnaires, called "Be Counted" forms, will be available at Walk-in Ques-



tionnaire Assistance Centers and other public locations for pick up and completion by people who believe that they have not been counted in the census.

Moreover, a well-publicized toll-free telephone number will assist those who request to respond to the census by this method.

#### **Traditional Public Relations**

For Census 2000, the public relations effort will be decentralized with media specialists assigned directly to local census offices to cultivate press contacts and respond to media inquiries.

#### **Special Events**

A variety of special events—such as parades, athletic events, public service television documentaries, Census in the Schools—will be co-sponsored by state, local, and tribal governments and by community organizations and businesses. The events will emphasize the importance of participating in the census and will motivate people to respond.

#### **MILESTONES**

July 1996	Began hiring 12 government partnership specialists (one per region)
July 1996	Began forming partnerships with local and tribal governments for geographic programs
April 1997	Began forming partnerships with national/umbrella governmental and nongovernmental organizations
October 1997	Awarded contract to Young and Rubicam for paid advertising campaign

October 1997	Began hiring media, community, and remaining government partnership specialists
October 1997	Began forming partnerships with local media, community organizations, and businesses
March 1998	Implement prototype advertising campaign for Census 2000 Dress Rehearsal

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**Section V.  
Questionnaire  
Content, Data  
Collection Forms,  
and Sampling Plan**

**V.A. QUESTIONNAIRE CONTENT**

**OBJECTIVE**

The goal in selecting Census 2000 questionnaire content is to meet the many statutory data requirements of Federal agencies, as well as the needs of state, local, and tribal governments to administer governmental programs. Given the many critical uses of census data, it is essential that the Census 2000 questionnaires contain those topics that will produce data our Nation will need as it enters the 21st Century. Nevertheless, the Census Bureau must balance the many demands for census information against the length of the questionnaires and the burden on the respondents to complete them.

**MAJOR FEATURES**

The content determination process is used to select the questions to be asked on the census forms. The objective of the Census 2000 content process is to develop questions that are easy to understand and answer by all segments of the population and thus yield the highest and most valid response.

The major components and general timing of Census 2000 content development activities are depicted in Figure V-1.

- Shortly after the 1990 census, the Census Bureau reviewed and evaluated the 1990 census questions through a content reinterview.
- The Census Bureau then organized an extensive review and consultation program to determine which subjects should be included in Census 2000.



- We assessed the legislative and geographic requirements of census data for both the Federal and non-Federal sectors. *Federal* agencies were asked to identify all legal mandates and programs requiring census data. *Non-Federal* requirements were obtained by means of a survey directed to a broad spectrum of data users such as state, local, and tribal governments; ethnic and community organizations; the business sector; academic researchers and librarians; religious groups; and the general public.
- We also maintained regular contact with our standing advisory committees, expert panels, professional associations, housing data-user groups, and community and ethnic organizations to ensure that all segments of the data-user community would be kept informed throughout the content development process.

**Figure V-1. Content Planning Path for  
Census 2000**

(CHART OMITTED)

- Two census tests were conducted to evaluate the questionnaire content proposed for Census 2000. The most extensive of these was the 1996 National Content Survey (formally known as the U.S. Census 2000 Test), which was designed to test new and revised question wording, formatting, and sequencing. The 1996 Race and Ethnic Targeted Test (formally known as the 1996 Census Survey) examined several major possible changes to the race and ethnic questions for Census 2000. Also, the Census Bureau in partnership with the Bureau of Labor Statistics conducted a supplement on race and ethnicity to the May 1995 Current Population Survey. During this time, the Census Bureau also conducted a wide range of focus group studies and cognitive research to elicit information about questionnaire content and design.
- On March 31, 1997, as required by law, the Census Bureau submitted a list of subjects planned for inclusion in Census 2000 to the Secretary of Commerce for transmission to Congress. As the chart below shows, both the short and long forms proposed for Census 2000 have fewer subjects than their 1990 census counterparts.

Table V-1

(Chart Omitted)

- Table V-1 provides the current plans for content for the Census 2000 questionnaire.
- The law requires that the actual questions for Census 2000 be submitted to the Congress by April 1, 1998. Thus, we have determined the particular wording, format, and sequence of individual questions. To make these critical decisions, the Census Bureau was guided by:
  - Any budget and content constraints imposed by the Congress
  - The results of our Census 2000 research and testing program
  - The advice generated from our ongoing consultation process with stakeholders
  - The legislative requirements for data from the questions

**TABLE V-1. SUBJECTS PLANNED FOR INCLUSION IN CENSUS 2000****100-PERCENT SUBJECTS**

<b>POPULATION</b>	<b>HOUSING</b>
Name	Tenure (whether home is owned or rented)
Sex	
Age	
Relationship	
Hispanic origin	
Race	



## SAMPLE SUBJECTS

## POPULATION

***Social characteristics:***

Marital status  
 Place of birth, citizenship, and  
 year of entry  
 Education-school enrollment and  
 educational attainment  
 Ancestry  
 Residence 5 years ago (migration)  
 Language spoken at home  
 Veteran status  
 Disability  
 Grandparents as caregivers \*

***Economic characteristics:***

Labor force status (current)  
 Place of work and journey to work  
 Work status last year  
 Industry, occupation, and class of  
 worker  
 Income (previous year)

## HOUSING

***Physical characteristics:***

Units in structure  
 Number of rooms  
 Number of bedrooms  
 Plumbing and kitchen facilities  
 Year structure built  
 Year moved into unit  
 House heating fuel  
 Telephone  
 Vehicles available  
 Farm residence

***Financial characteristics:***

Value of home  
 Monthly rent (including  
 congregate housing)  
 Shelter costs (selected monthly  
 owner costs)

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\*New subject for Census 2000.

## 1990 CENSUS SUBJECTS DROPPED FOR CENSUS 2000

## POPULATION

Children ever born (fertility)  
 Year last worked (*An abbreviated  
 screener will be included with ques-  
 tions about industry, occupation, and  
 class of worker; this will allow us to  
 reduce respondent burden and prop-  
 erly define the "experienced civilian  
 labor force"*)

## HOUSING

Source of water  
 Sewage disposal  
 Condominium status

- The questions we plan to ask in the Census 2000 Dress Rehearsal will be, to the greatest extent possible, the same as those we subsequently include in Census 2000. In this way, we can develop prototypes of the products planned for Census 2000, solicit comments from our stakeholders, and fine-tune the products for the census.
- The Census Bureau also is required by law to submit the recommended questions to the Office of Management and Budget (OMB), which has the responsibility of ensuring that the questions meet essential data needs and that respondent burden (the time it takes for the average household to fill out a questionnaire) is held to a minimum.

#### **MILESTONES**

March 31, 1997	Submitted subjects planned for Census 2000 to the Congress
April 1, 1998	Submit questions planned for Census 2000 to the Congress
July 1998	Submit questions planned for Census 2000 to OMB

### **V.B. MAILBACK QUESTIONNAIRE FORMS**

#### **OBJECTIVE**

The goals in developing the Census 2000 questionnaires are to increase mail response and the accuracy of the information collected. The Census Bureau intends to do this by:

- Designing forms that are more respondent-friendly, and
- Increasing the number of mail contacts with respondents.

#### **MAJOR FEATURES**

In Census 2000, the questionnaire mailout/mailback system again will be the primary means of census-taking. Cities, towns, and suburban areas with city style addresses (house number and street name), and rural areas where city style addresses are used for mail delivery will comprise the mailout/mailback areas. In areas where the addresses are predominantly non-city style, census enumerators will deliver addressed questionnaires for respondents to mail back.

#### **Respondent-Friendly Design**

The Census Bureau has been working with private sector designers to produce more streamlined forms that are easy to read and understand, show people why they are asked the questions, and are simple to fill out and mail back. One key innovation is that the design of the complete mailing package—including the outgoing and return envelopes, cover letter, questionnaire, motivational slogans, and logo—will be compatible and integrated with the rest of the marketing and communications effort.



The following user-friendly design features have been shown in our testing and research program to improve response and are being incorporated into the design of the Dress Rehearsal and Census 2000 forms:

- A larger, easier-to-read font
- Graphic icons distributed throughout the forms to illustrate the benefits of the census to the individual and community
- Strong visual contrast—using color and shading—between the questions and answer boxes to make it easier to identify the correct space to answer
- All questions for each household member grouped together in one space instead of in the row-column answer format with the questions placed vertically down the left-hand side of the page and the names of household members placed horizontally across the top
- Navigational aids such as arrows to guide the respondent through the questionnaire
- Putting the respondent instructions directly on the form instead of in a separate guide

In redesigning the forms, the Census Bureau also is incorporating the specifications required for printing, postal delivery, and electronic image data capture.

#### **Types of Mailback Questionnaires**

Census 2000 will include two types of questionnaires for mailout:

- A “short” form will be delivered to approximately 83 percent of all housing units. It will include the basic population and housing questions pertaining to each household member (up to 5 people) and housing unit.

This form will allow the respondent to list up to 12 household members.

- A “long” form will be delivered to a sample—approximately 17 percent—of all housing units. It will include the short-form questions as well as additional questions on the characteristics of each household member (up to 5 people) and the housing unit. Obtaining these detailed, more comprehensive data on a sample basis is less costly than obtaining the same information from all housing units. This form will allow the respondent to list up to 12 household members.

#### **Delivery of Questionnaires in Other Languages**

Questionnaires in English will be delivered to every housing unit. For the first time in a decennial census, specific neighborhoods will be targeted for delivery of questionnaires in Spanish or other languages, both short and long form. While the Census Bureau has made Spanish-language questionnaires available in the past, non-English questionnaires have never before been included in the initial mailout package.

#### **Multiple Mailing Strategy**

The Census Bureau is investigating policy and operational issues of conducting a new mailing strategy for Census 2000. This strategy—which has been demonstrated in our testing and research to boost response—increases the number of mail contacts we have with respondents. The multiple mail contacts consist of:

- An advance notice letter to every mailout address that alerts households the census form is being sent to them soon
- A questionnaire to every mailout address

- A postcard to every mailout address that serves as a thank you for respondents who have mailed back their questionnaire or as a reminder to those who have not

A full-scale multiple mailing strategy, using first-class postage for all mailing pieces, will yield maximum mail response and increase the likelihood of delivery to the correct address. In areas where census enumerators will deliver questionnaires, the U.S. Postal Service will deliver an advance notice letter and thank you/reminder postcard to every "Residential Customer" so these people will be alerted to the census.

#### **MILESTONES**

November 1998	Government Printing Office begins awarding contracts for printing short form and long form
February 2000	Complete questionnaire printing and addressing for mailing
March 2000	USPS delivers questionnaire to every mailout address
March 2000	Census enumerators deliver questionnaires in areas lacking city style addresses

### **V.C. FIELD DATA COLLECTION FORMS**

#### **OBJECTIVE**

While the mailout questionnaires will account for the bulk of Census 2000 data collection, the Census Bureau is developing many other forms to ensure that everyone has the opportunity to participate in Census 2000. These special forms will be used to enumerate people who live in a residence other than the usual house, apartment, or mobile home, or to increase the participation of people who might otherwise go uncounted in the census.

#### **MAJOR FEATURES**

- Several types of questionnaires—containing only population questions for one person—will be used to enumerate specific segments of the population. These forms will be used to count people in living arrangements requiring special operations, such as college dormitories, nursing homes, shelters, and prisons. Long-form versions are being developed for some of the forms; many will be translated into Spanish.
- Short- and long-form "simplified enumerator questionnaires" are being developed that are worded to conform to a personal interview method of data collection. These forms will be used as basic data collection instruments by field enumerators during personal visits to households.
- A short form is being prepared for the Be Counted National campaign (see page IX-3) for people who did not receive a questionnaire or believe they were



not included on a census form. These unaddressed Be Counted questionnaires will be printed in several languages and placed at locations where people frequent, such as in community centers and Walk-in Questionnaire Assistance Centers. The responses on these forms will be checked against census records to eliminate duplications.

#### **MILESTONES**

July 1999      Begin questionnaire printing

### **V.D. SAMPLING PLAN FOR THE LONG-FORM QUESTIONNAIRE**

#### **OBJECTIVE**

Since the 1960 census, the bulk of decennial census data has been collected from a sample of housing units. Likewise in Census 2000, the Census Bureau will deliver the long-form questionnaire to a sample of housing units. The use of sampling will allow the Census Bureau to meet the objectives of reducing cost and maintaining the level of respondent burden comparable to the 1990 census.

#### **MAJOR FEATURES**

Decennial census data collected on a variety of socioeconomic and housing subjects are required by Federal agencies for implementing programs defined in legislation. In addition, these data are used by state, local, and tribal governments, as well as the private sector for planning and developing social and economic policy and for a myriad of other uses.

To collect these valuable data, Census 2000 will implement a **variable rate sampling scheme**. Use of **variable** sampling rates will allow for more efficient allocation of the sample and will maintain the accuracy and reliability of census data at small geographic levels (block groups, census tracts, and small communities), while reducing respondent burden.

The variable rate sampling scheme for the Census 2000 long form will be similar to the 1990 census scheme and basically will be as follows:

- The overall sampling rate will be about 1-in-6 households or 17 percent.

- We will assign sampling rates of 1-in-2, 1-in-4, 1-in-6, or 1-in-8 to functioning governmental units and census tracts based on precensus counts of housing units. School districts will be considered governmental units, and the precensus counts of housing units for American Indian and Alaska Native areas will reflect the American Indian and Alaska Native populations.

#### **MILESTONES**

September 1998	Determine final long-form sampling methodology
September 1999	Determine long-form sample to implement variable-rate sampling methodology

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## **Section VI. Address List Development and Review/Update**



## VIA. ADDRESS LIST DEVELOPMENT

### OBJECTIVE

The Census Bureau will construct a complete listing of living quarters to use for questionnaire delivery and to control the collection and tabulation of Census 2000 data.

### MAJOR FEATURES

To enumerate and tabulate Census 2000, the Census Bureau must identify all living quarters and locate these living quarters with respect to the geographic entities for which we report data. We accomplish this by creating and maintaining a Master Address File (MAF) that identifies all living quarters and spatially locates those addresses using our geographic database called TIGER®\*. The building and maintenance of the MAF and TIGER involve partnerships with other Federal agencies, state, local, and tribal governments, regional and metropolitan planning agencies, the private sector, and nongovernmental organizations.

In order for Census 2000 to be as accurate, complete and cost effective as possible, the address list that serves as the basic control for the census must be as accurate and complete as possible. If an address is not on the list, then its residents are less likely to be included in the census. Recognizing this fundamental connection and based on evidence gained from the experiences of the past two years, in September 1997, the Census Bureau completed an intensive Census 2000

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\* TIGER® is a registered trademark of the U.S. Bureau of the Census. For ease of presentation, the trademark symbols for TIGER and TIGER-related products are omitted from the text.

Address List Reengineering effort. The reengineering led to changes in the initial plan that will increase the accuracy and completeness of the Census 2000 address list.

The inventory of all living quarters includes addresses and/or location descriptions for each housing unit and each group quarters. Except where the address list is created at the time of enumeration (for list/enumerate areas), each listing must have a complete address that can be used for mailing a census questionnaire and/or a location description that can be used by an enumerator to locate the living quarters. Each listing must be linked to the TIGER data base.

We are creating and maintaining the MAF through a series of operations, described in the following:

In areas where most mailing addresses are city style (for example, 101 Main Street) we:

- Create the MAF by combining addresses from the 1990 census Address Control File with those addresses in the USPS Delivery Sequence File (DSF). The 1990 census Address Control File is a nationwide file of addresses for all living quarters included in the 1990 census. The DSF is a national file of individual mail delivery point addresses. As part of a cooperative agreement, the USPS provides the Census Bureau with updated DSFs on a regular basis.
- Locate these addresses in the TIGER data base. Where we cannot locate an address, the location is researched and resolved through an office or field operation, or through assistance from local partners. As a result of this research, we identify new

features and correct and add address ranges to the TIGER data base. (See page VII-1.)

Since we will use mailout/mailback enumeration methodology in areas with a predominance of mail delivery to city style addresses, we need to determine where mail is not delivered to city style addresses. In addition, there are some areas that are very remote or sparsely populated to which we want to send an enumerator only once. We identify these areas for different enumeration methodologies using information on the types of mail delivery, the types of addresses, and our regional office knowledge of the area. We create the address list in these areas during:

- Address listing operations. In areas where the addresses are predominately non-city style, the Census Bureau will create an address list through a door-to-door canvassing operation and identification of the location of each structure on census maps. The completed address listings and their map locations will be recorded in digital format and added to the MAF and TIGER data base, respectively. We will enumerate these areas by having enumerators leave addressed census questionnaires, which residents will complete and mail-back, during an update/leave operation (enumerators also update the address list and census maps during this operation). Where there is no mailing address for the listing or the mailing address is not a city style address, the listing will include a location description.
- List/enumerate operations. Census enumerators will create the address list at the time of enumeration while canvassing their assignment area and picking up or completing unaddressed questionnaires that the USPS previously delivered to each

household. The completed address listings and their locations on a census map will be recorded in digital format and added to the MAF and TIGER data base.

- Map update operations. Before the address listing and list/enumerate operations, the Census Bureau will work with local and tribal government partners to update the streets and roads in the TIGER database. Updating the TIGER database with new development in these areas will make the address listing more efficient and help ensure that no living quarters are missed.

We will incorporate local knowledge to update the MAF through the Local Update of Census Addresses (LUCA) program. (See page VI-5.)

A separate operation will build an inventory of all special places. We will interview an official at each special place using a Facility Questionnaire. The responses to the questionnaire will identify each group quarters and any housing units associated with the special place. We will classify each group quarters and any housing units according to whether they will be enumerated as part of special place enumeration or through regular enumeration. We will add those group quarters and housing units to the MAF and link them to the TIGER data base, respectively.

In city style address areas, we introduced two operations as a result of the reengineering effort to improve the quality of the MAF. The Census Bureau will conduct a 100 percent block canvass to ensure consistently good address coverage in the MAF and to ensure correct geographic locations for all addresses. As close to Census Day as possible, we also will ask USPS letter



carriers to validate the addresses in the MAF, identifying and adding addresses that are missing.

As another quality check, we will be comparing the number of addresses in the MAF with independent housing benchmarks for aggregated areas and releasing results for Census Divisions and at the national level.

#### **MILESTONES**

September 1997	Determined areas for different enumeration methodology
January-April 1998	Conduct the Map Update program for areas without city style addresses
April-November 1998	Conduct the LUCA program for city style address areas
July-December 1998	Conduct address listing operations (except list/enumerate)
January-May 1999	Conduct 100 percent block canvassing
January-April 1999	Conduct the LUCA program for address listing areas
July 1999	Deliver first nationwide MAF for Census 2000
January 2000	Conduct the Postal Check
February 2000	Complete MAF/TIGER integration for areas with mail delivery to city style addresses

#### **VI.B. ADDRESS LISTING**

##### **OBJECTIVE**

To develop the Census 2000 address list in areas of predominantly non-city style addresses.

##### **MAJOR FEATURES**

- Census enumerators will canvass their assignment areas and list each living quarters, recording its mailing address and a description of its physical location. The enumerators will identify the approximate location of each structure containing living quarters by placing a spot on a census map, and they will update the information on their maps.
- The Census Bureau will convert the addresses and map updates into computer readable form. As address listing is completed, the Census Bureau will data capture the address information in a keying operation. Address listing maps will be scanned to produce computer readable images of the map spots. In the final data capture step, the map spots and updated map information will be entered into the TIGER®\* data base.
- The Master Address File will be created for the listed areas from the address information identified and captured during the address listing operation.

\*TIGER® is a registered trademark of the U.S. Bureau of the Census.

**MILESTONES**

January-May 1998	Conduct Map Update operation
February-June 1998	Update TIGER data base
August-December 1998	Conduct address listing operation
September 1998-February 1999	Add addresses to the MAF and map corrections to TIGER
January-April 1999	Conduct the LUCA program for address listing areas

**VI.C. LOCAL UPDATE OF CENSUS ADDRESSES  
PROGRAM**

**OBJECTIVE**

To create partnerships with local and tribal governments to improve their jurisdictions' address list for Census 2000.

**MAJOR FEATURES**

The Local Update of Census Addresses (LUCA) program is a partnership program that will allow the Census Bureau to benefit from local knowledge in developing its MAF. The participants will contribute to a more complete and accurate census for their area.

LUCA is made possible by the Census Address List Improvement Act of 1994 (P.L. 103-430) which, for the first time, authorizes designated representatives of local and tribal governments to review the MAF. The program will operate as follows:

- The local or tribal government will designate a liaison to review the portion of the MAF for their jurisdiction. The liaison will be subject to the same restrictions on revealing census information as are census workers. The address list is confidential under Title 13, and participants must sign an oath promising to protect the confidentiality of the addresses.
- The Census Bureau will send the liaison a listing from the MAF (in either paper or electronic form), the accompanying maps for their jurisdiction, and a tally of MAF records for each census block.
- The liaison will provide input regarding the completeness and accuracy of the MAF.



- Census Bureau staff will validate the address information provided by local and tribal participants and provide feedback about address actions it has taken to the participants.
- Following the feedback, Census Bureau staff will work with the local and tribal government participants to resolve any remaining differences.
- P.L. 103-430 allows the local participants to appeal final Census Bureau decisions.
- The Census Bureau will conduct the LUCA Program during two distinct time periods that correspond to the time schedule for developing the MAF. For areas with predominantly city style mailing addresses, participants may begin reviewing the address list in April 1998, because the MAF has been created using addresses obtained from the USPS. For other areas, the address list will not be available for review until 1999, after the Census Bureau completes the Address Listing Operation to create the MAF in these areas. These areas can get an early start by reviewing and updating maps for their communities in early 1998; this activity will benefit the Census Bureau's later address listing work by yielding more up-to-date street information for reference by the address listing field staff.
- The details of the LUCA program in remote or sparsely settled areas, where we compile address lists during enumeration, are under development.

## MILESTONES

### City Style Mailing Address Areas

January-February 1998	Mail invitation letters for address list review to local and tribal governments
April-November 1998	Local and tribal governments conduct review
August 1998-February 1999	Provide summary feedback to participants
March-August 1999	Provide specific address feedback to participants and reconcile differences
May 1999-January 2000	LUCA appeals

### Non-City Style Mailing Address Areas

January 1998	Mail invitation letters for map review to local and tribal governments
January-May 1998	Local and tribal governments conduct map review
September 1998	Mail invitation letters for address list review to local and tribal governments
January-April 1999	Local and tribal governments conduct address list review
March-August 1999	Provide feedback to participants and reconcile differences
May 1999-January 2000	LUCA appeals

## VI.D. BLOCK CANVASSING

### OBJECTIVE

To ensure the completeness and accuracy of the Census 2000 address list for areas having predominantly city style addresses used for mail delivery.

### MAJOR FEATURES

- Census enumerators will canvass every road and street looking for every place where people live or could live, comparing the address of each living quarters with the addresses in the Census 2000 address list. They will add addresses missing from the address list, delete addresses on the address list that duplicate other addresses or do not exist on the ground, and ensure all addresses are assigned to the correct geographic location. The enumerators also will update census maps with information about the location and names of roads and streets.
- The Census Bureau will convert the new and corrected address and map information into computer readable form. As block canvassing is completed, the Census Bureau will data capture the address updates in a keying operation and the updated map information will be entered into the TIGER®\* data base.
- The MAF will be updated with the results of the block canvassing in time to use the updated address information for delivery of questionnaires.

\*TIGER® is a registered trademark of the U.S. Bureau of the Census.

### MILESTONES

January-May 1999  
April-June 1999

Conduct block canvassing  
Update the MAF and TIGER



## **VI.E. POSTAL CHECK**

### **OBJECTIVE**

To validate the city style addresses before the delivery of Census 2000 questionnaires through a check of the MAF by USPS letter carriers. This postal validation will help ensure that new construction and previously missed units are included in time for the Census 2000 questionnaire mailout.

### **MAJOR FEATURES**

- Following the LUCA and block canvassing operations, and as close to Census Day as possible, the Census Bureau will give the USPS the census addresses printed on cards.
- USPS letter carriers will compare the census addresses to the postal delivery addresses on their routes, adding addresses for which they do not have a census address card.
- The Census Bureau will key the addresses added by the USPS and add new addresses to the MAF.

### **MILESTONES**

November 1999	Provide census addresses to USPS
December 1999-January 2000	USPS compares census addresses to delivery addresses
February 2000	Add new address to the MAF

## **Section VII. Geographic Data Base Development-TIGER**

## VII. GEOGRAPHIC DATA BASE DEVELOPMENT

### TIGER®\*

#### OBJECTIVE

To provide the necessary information to associate each living quarters in Census 2000 to a spatial location, each location to a specific geographic area, and each geographic area to the correct name or number and attributes.

#### MAJOR FEATURES

The geographic data base for the census—TIGER (Topologically Integrated Geographic Encoding and Referencing)—provides the geographic structure for the control of the data collection, tabulation, and dissemination operations.

The geographic data base constantly changes. Not only are new streets built, but some streets cease to exist, and the path of some existing streets moves. The names and address ranges associated with these streets change, too. Not only is the inventory of geographic entities different from year to year, but also the boundaries, names, and related attributes for the entities may change.

To ensure that the information in the TIGER data base is complete and correct, the Census Bureau works in partnership with other Federal agencies, state, local,

\*TIGER® is a registered trademark of the U.S. Bureau of the Census. For ease of presentation, the trademark symbols for TIGER and TIGER-related products are omitted from the text.

and tribal governments, and others in the public and private sectors. We maintain the TIGER data base through internal programs and partnership activities.

The Census Bureau obtains updates to the feature network, including associated address ranges, through the following operations:

- Census MAF building activities. These include office resolution of addresses that cannot be automatically spatially located and the various address list improvement operations.
- Partnership MAF building activities. These include the LUCA program, and local participation in the resolution of addresses that need to be spatially located.
- Digital files. Local and tribal governments with suitable digital files provide them to the Census Bureau in lieu of a manual updating process. We transfer the update information from the local file to the TIGER data base by an automated process.
- Local and tribal governments. In response to a preview of the census map of their jurisdiction, local and tribal governments may furnish the Census Bureau with updated street features and their names.

We obtain updates to the boundaries, names, and attributes of the various geographic entities for which we tabulate data through various methods. These include:

- A voluntary survey designed to collect an accurate inventory of all active general-purpose governmental units and to obtain up-to-date information on boundary changes.



- A program that provides the highest elected official of each active general-purpose governmental unit with a copy of the census map that shows the jurisdiction boundaries we plan to use to tabulate Census 2000. The local or tribal official will review and validate these boundaries. This program replaces the local review of boundaries portion of the 1990 Post-census Local Review Program.
- A program that provides local and tribal participants the opportunity to delineate Census 2000 participant statistical areas (block groups, census county divisions, census designated places, and census tracts).
- Additional programs that offer participants the opportunity to identify other areas for which the Census Bureau will tabulate data (for example, traffic analysis zones).

The Census 2000 boundaries for general-purpose governments and other legal entities are those legally in effect on January 1, 2000. Where the boundaries for any geographic entity intersect a feature, we assign any addresses associated with that feature to the geographic entity. The LUCA and boundary collection and validation programs also provide participants with the opportunity to review the assignment of addresses in their jurisdiction.

The information from all these programs and operations is inserted into the TIGER data base where it is processed and undergoes various checks for consistency and accuracy. As required by specific census operations, the Census Bureau creates extracts from the TIGER data base to produce the necessary map products and geographic files.

## MILESTONES

January 1998	Begin survey to collect January 1, 1998 boundaries
November 1998	Begin survey to collect January 1, 1999 boundaries
October 1999	Begin survey to collect January 1, 2000 boundaries
January 2000	Begin conducting final boundary validation
October 2000	Establish tabulation geographic structure

United States  
CENSUS  
2000

**Section VIII.  
Field Office  
Infrastructure and  
Staffing**

**VIII.A. FIELD OFFICE INFRASTRUCTURE AND  
STAFFING**

**OBJECTIVE**

To develop and set up an effective and cost-efficient infrastructure that supports complete and accurate enumeration in Census 2000 and the capture and processing of census information in time to meet Constitutional and legislative requirements.

**MAJOR FEATURES**

Since the decennial census requires a massive mobilization of human and physical resources, the Census Bureau will develop an extensive temporary office infrastructure across the country to conduct Census 2000.

**Physical Infrastructure**

The function of each major infrastructure component is as follows:

Regional Census Centers (RCCs) - 12 stateside Centers (and an Area Office in Puerto Rico)

- Manage all census field data collection operations, address listing, and address list enhancement for city style address areas through a network of Census Field Offices (CFOs) and Local Census Offices (LCOs)
- Coordinate Local Update of Census Addresses (LUCA) activities
- Produce maps



- Conduct geographic activities such as geocoding, TIGER®\* data base updates, and working with local participants on the participant statistical programs and the P.L. 94-171 Redistricting Data Program
- Recruiting temporary staff
- Manage payroll and personnel administrative system

#### Census Field Offices (CFOs) - (402 Offices)

- Perform address listing
- Conduct local recruiting
- Perform clerical review of completed field work

#### Local Census Offices (LCOs) - maximum 520 Offices (511 stateside, 9 in Puerto Rico)

- Produce enumerator maps and assignments
- Conduct local recruiting
- Conduct outreach and promotion (for example, the Be Counted campaign)
- Conduct group quarters/special place/service-based enumeration operations
- Coordinate military enumeration (if applicable)
- Conduct update/leave operation
- Conduct list/enumerate operation
- Conduct followup enumeration (nonresponse follow-up, coverage edit, address verification)
- Manage field staff payroll and personnel administrative system
- Perform block canvass operation (early opening LCOs)

\*TIGER® is a registered trademark of the U.S. Bureau of the Census.

#### Data Capture Center (DCC) in Jeffersonville, Indiana

- Process address listing
- Check in mail returns
- Edit questionnaires
- Conduct data capture
- Code questionnaires
- Process quality check survey
- Manage payroll and personnel administrative system

#### Other Data Capture Centers (DCCs) - 3 Centers

- Check in mail returns
- Edit questionnaires
- Conduct data capture
- Manage payroll and personnel administrative system

#### Establishing the above offices will involve the following activities:

- Lease office space
- Obtain furniture, equipment, and supplies
- Procure and install computer hardware and software (except for CFOs)
- Establish voice and data line connections

#### Administrative Infrastructure

In addition to physical infrastructure, there are administrative structure requirements that must be in place to recruit, manage, and pay the census workers who are hired.

#### These functions consist of the following:

- Develop system of competitive pay rates
- Develop position descriptions
- Validate selection aid test

- Implement Decennial Automated Name Check (DANC) system for criminal history screening of potential census workers
- Implement Preappointment Management System/Automated Decennial Administrative Management System (PAMS/ADAMS) to handle hiring of temporary census workers and to manage the payroll system
- Develop bonus/incentive pay system that supports producing a quality product, staff retention, and high productivity

#### **MILESTONES**

November 1997-March 1998	Open RCCs
June 1998-September 1998	Open CFOs
September 1998-October 1999	Open LCOs (Early opening LCOs September 1998; Late opening LCOs October 1999)
April 1999-September 1999	Open DCCs

### **VIII.B. FIELD OFFICE STAFFING**

#### **OBJECTIVE**

To recruit and train a sufficient number of temporary census workers to complete Census 2000 operations on schedule.

#### **MAJOR FEATURES**

The decennial census is the largest peacetime activity undertaken by the Federal Government. The Census Bureau expects to hire about 500,000 temporary census workers in the field to conduct Census 2000. Attaining this goal will require the recruiting and testing of nearly 3 million of persons for a wide range of positions such as local census office managers, enumerators, partnership specialists, media specialists, and clerks. This effort will require a very large recruiting effort throughout the country.

Every job applicant will have to take a written test and meet certain other requirements before being hired as a census worker. The Census Bureau will use the Decennial Applicant Name Check (DANC) system to screen all applicants for criminal histories. Qualified applicants who are selected will be required to take the oath of office and sign an affidavit of nondisclosure in which they agree they will "not disclose any information contained in the schedules [questionnaires], lists, or statements obtained for or prepared by the Bureau of the Census, to any person or persons either during or after employment."

In recognition of the changing composition of the labor force and the increasing difficulty in hiring a sufficiently large number of temporary census workers, especially



enumerators, to conduct the census, the Census Bureau is implementing different and innovative methods of setting pay and incentives for persons to work on Census 2000. In addition, the Census Bureau is attempting to expand the labor pool from which it can recruit by negotiating with other Federal and state agencies that manage retirement and income transfer programs (Federal civilian and military retirement, Aid to Families with Dependent Children, Public and Indian Housing program, and so on) to reduce any barriers and encourage recipients of the various programs to work for the Census Bureau.

#### **MILESTONES**

January 1997	Began DANC system
June 1998	Begin recruiting for census field offices

United States  
CENSUS  
2000

## **Section IX. Field Data Collection**

## IX.A. BASIC ENUMERATION STRATEGY

### OBJECTIVE

To obtain a completed questionnaire for every housing unit in Census 2000.

### MAJOR FEATURES

To ensure that we obtain a completed questionnaire from every housing unit, the Census Bureau must first make sure that a questionnaire is delivered to every housing unit. We will accomplish this by using one of the following three basic data collection methods:

- **Mailout/mailback.** The Census Bureau will use U.S. Postal Service (USPS) letter carriers to deliver questionnaires to the vast majority of housing units that have city style addresses (house number and street name).
- **Update/leave.** In areas where the addresses used for mail delivery are predominantly noncity-style, enumerators will leave addressed census questionnaires at each housing unit for the householder to complete and mail back. They also will update and make any necessary corrections and/or additions to their maps and their address lists as they deliver the questionnaires.
- **List/enumerate.** In very remote or sparsely-populated areas, enumerators will visit each housing unit and pick up or complete unaddressed short-form questionnaires that the USPS previously delivered to each unit. The enumerators will ask additional long-form questions of a sample of units. They also will develop an address list for the area and spot the housing unit's location on a map.

Additional data collection strategies noted in the following sections cover enumeration of special population groups (for example, persons in group quarters and on military bases), people with no usual residence, and nonresponse followup of housing units that did not return a questionnaire.

### MILESTONES

March 13-March 15, 2000	Deliver initial mailout/ mailback questionnaires
March 3-March 30, 2000	Conduct update/leave operation
March 31-May, 1 2000	Conduct list/enumerate operation



## IX.B. TELEPHONE ASSISTANCE AND THE INTERNET

### OBJECTIVE

To provide respondents with convenient access to obtain assistance in the completion of their Census 2000 questionnaires or to respond directly to the census.

### MAJOR FEATURES

- The Census Bureau will contract for an extensive Telephone Questionnaire Assistance (TQA) operation to answer general questions about the census so that the respondent can complete the census questionnaire and mail it back. This service will have a well-publicized national toll-free number and will use an automated touch-tone system that can handle a large number of calls concurrently. Assistance will be available in English, Spanish, and other languages. There also will be a toll-free telephone device for the hearing impaired. Finally, respondents will be able to access a census Internet website for assistance in completing the census questionnaire.
- In addition, TQA will offer a means for callers to respond directly to the census. Operators will record answers to the census over the telephone, if this service is requested during telephone assistance. Assistance will be available in English, Spanish, and other languages.

### MILESTONES

October 1998	To be determined
March-June 2000	Conduct TQA

## IX.C. BE COUNTED NATIONAL CAMPAIGN

### OBJECTIVE

The Be Counted National Campaign will provide a means for people to be included in Census 2000 who may not have received a census questionnaire or believe they were not included on one. The Census Bureau will place particular emphasis on developing ways to include population groups that historically have been undercounted.

### MAJOR FEATURES

#### Be Counted Questionnaire

The Be Counted questionnaire is being designed to be respondent friendly and easy to understand and complete by anyone who picks it up. This would include people with a usual residence who did not receive a questionnaire at their address, people who believe the returned questionnaire for their address excluded them, people who require questionnaires in different languages, migrants or seasonal farm workers, those who have no usual residence, and so forth. These forms will contain short-form questions along with several additional items needed to process and match the forms to the census results.

#### Questionnaires Available in Many Locations and In Numerous Languages

Be Counted questionnaires will be accessible at public locations, such as Walk-in Questionnaire Assistance Centers and other places where people frequent.

The distribution of the Be Counted forms will begin just before Census Day and will end just before the nonresponse followup operation begins.

Be Counted forms will be printed in several languages in addition to English and Spanish. We will consult with our local partners to determine which languages to use for these forms.

#### **MILESTONES**

September 1998	Submit printing specifications of Be Counted questionnaires for bid
August 1999	Begin printing Be Counted questionnaires
March 31-April 12, 2000	Conduct Be Counted Campaign

### **IX.D. PROCEDURES TO ENUMERATE SPECIAL POPULATIONS**

#### **OBJECTIVE**

In Census 2000, the Census Bureau will implement a comprehensive set of procedures to enumerate people who do not live in traditional housing units. These include people who live in group quarters situations (for example, nursing homes, group homes, and colleges), people without housing, people who live at migrant and seasonal farmworker camps, and people living on military installations and ships. Special procedures also will be applied to those who live in unique areas of the country like remote Alaska.

#### **MAJOR FEATURES**

##### **Special Place Facility Questionnaire Operation**

To enumerate people at these special locations, we must identify the places. Identification of these places will occur on a flow basis, by means of a procedure called the Special Place Facility Questionnaire Operation. This operation will update existing information for our inventory of special places and group quarters, identify additional group quarters, identify contact persons at each location, assign a group quarters type code, determine availability of administrative records, identify any housing units at and/or associated with the special place or group quarters, and collect other administrative information. Most information will be collected during an automated Computer-Assisted Telephone Interview (CATI), with some cases being completed by personal visit using a paper census questionnaire.



### **Group Quarters Enumeration**

Staff in our local census offices will conduct the group quarters enumeration. Starting in January 2000, census workers will make advance visits to the group quarters to meet with facility staff and discuss the upcoming census enumeration. These visits are very beneficial because they promote and encourage participation in the census, and identify any difficulties that might be encountered during the enumeration. In April 2000, enumerators will enumerate people in each group quarters by listing all the residents and distributing questionnaire packets. When needed, enumerators will provide assistance in completing the questionnaires. Enumeration results will be checked and verified using a quality control checklist to ensure enumeration at the facility was complete.

A small number of facilities, such as jails and prisons, will self-enumerate their facility. These facilities will use regular census procedures to conduct the enumeration, and the facility staff become special sworn census employees to protect the confidentiality of the census information.

### **Transient Night (T-Night) Operation**

Transient night, commonly referred to as T-Night, is an operation designed to count persons of a highly transient nature. T-Night will take place on the day before Census Day (on Friday, March 31). T-Night enumerators will visit and interview people occupying campgrounds at racetracks, recreational vehicle (RV) campgrounds or RV parks, commercial or public campgrounds, fairs and carnivals, and marinas. Every person enumerated during T-Night will have the opportunity to report a usual residence.

On T-Night, enumerators will visit each assigned T-Night place, meet with a contact person at the site to explain the purpose of the visit, offer the Privacy Act notice, answer any questions, and verify information about the site. Then the enumerator will interview each person at the assigned location.

### **Remote Alaska Enumeration**

Several methods will be used to enumerate the varied types of areas in the State of Alaska. The two largest cities, Anchorage and Fairbanks (and their vicinities), will be designated as mailout/mailback areas due to their concentrated populations and existence of city style addresses. The rest of Alaska will be enumerated by the list/enumerate method, which also is being used in the sparsely populated areas of the lower 48 states.

The unusual feature of Census 2000 enumeration in Alaska will be the treatment of outlying or remote areas. Most of these settlements, located throughout the state, are accessible only by small-engine airplane, snowmobile, four-wheel-drive vehicle, dogsled, or a combination of these. Roads rarely exist to link the widely scattered settlements. These settlements range in population from a few people to several hundred persons, with a few larger places of 2,000 people or more.

The timing of the mailout/mailback enumeration will be the same as in other states. However, enumeration of the remote areas will begin earlier, in mid-February, but all census questions will be asked in relation to Census Day (April 1). The special timing will permit travel to these areas during the period when conditions will be most favorable. For example, the ground and rivers still will be frozen so that planes can fly in and

out, and the residents will still be at home. Once the spring thaw (or "breakup" as it is known locally) begins, travel to some of these areas will be difficult or impossible, and the people will leave home to fish and hunt. Enumerators will have to finish their work before then, or they will miss a large part of the population.

#### **Military/Maritime Enumeration**

People living on military installations and on maritime vessels will be enumerated during Census 2000. To enumerate people residing on military installations and on military ships, the Census Bureau will work with the Department of Defense and U.S. Coast Guard to identify housing units and other living quarters on the installations, and ships in U.S. waters. Different enumeration methodologies, such as mailing census questionnaires to housing units on installations and enumerating people at their work station, will be used.

The Census Bureau will work with the U.S. Maritime Administration and others to identify maritime vessels in operation at the time of the census and mail enumeration materials to those vessels for completion.

#### **MILESTONES**

June 1998-March 2000	Conduct Special Place Facility Questionnaire Operation
January 2000	Conduct advance visits to special places/group quarters
January 2000	Conduct local knowledge update of group quarters locations
February 2000	Begin enumeration in remote Alaska
March 31, 2000	Conduct T-night operation
April 3-May 6, 2000	Enumerate people at group quarters and conduct coverage improvement validation



## IX.E. ENUMERATION OF PEOPLE WITH NO USUAL RESIDENCE

### OBJECTIVES

To enumerate people with no usual residence in Census 2000. This operation, called Service-Based Enumeration (SBE), is designed to improve the count of an area by including people who use services and who might not be included through other enumeration methods.

### MAJOR FEATURES

The following SBE procedures are designed to include people who might otherwise be missed in the census by enumerating them at selected service locations, such as shelters and soup kitchens, and at targeted non-sheltered outdoor locations. SBE will not provide a count of homeless persons or of service users.

- The Census Bureau will work with local governments and community-based organizations to identify the list of service locations open at census time.
- Using simplified enumeration procedures and forms, the Census Bureau will conduct a one-time enumeration at shelters, soup kitchens, and regularly scheduled mobile food vans that provide services primarily for people without housing.
- The Census Bureau will use statistical techniques to improve the enumeration of people without housing.
- The Census Bureau plans to have enumerators visit targeted non-sheltered outdoor locations where people without housing congregate. These sites will be identified by local officials, advocacy groups, and community-based organizations.

- The Census Bureau will work with local officials and community-based organizations to identify camps and other locations where migrant and seasonal farmworkers can be found at the time of the census.

In addition to being enumerated at the designated service locations, people with no usual residence will be able to pick up Be Counted questionnaires at other selected service locations, such as clothing distribution centers, drop-in centers, and health care clinics serving people without housing.

We also will publicize a national toll-free telephone number and encourage people to respond that way if they do not have access to a census questionnaire.

### MILESTONES

March-July 1999	Develop list of service locations
April 3 and April 5, 2000	Conduct enumeration of people at service locations
April 2000	Distribute Be Counted questionnaires at service locations

## IX.F. SPECIAL DATA COLLECTION METHODS FOR TARGETED AREAS

### OBJECTIVE

To overcome barriers to successful enumeration in Census 2000 by implementing special data collection methods in targeted areas.

### DESCRIPTION

Many targeted methods will be used in Census 2000:

- The regional census centers will use 1990 Census data and their knowledge of local conditions to identify the most appropriate areas in which we might use targeted methods designed to overcome difficult enumeration barriers.
- This information will be shared with officials of local and tribal governments. In close consultation with these officials, we will then identify, in advance, areas that likely will require additional "get out the count" efforts.
- A team or crew of enumerators will go into a targeted area and conduct the enumeration in a short period of time. Team enumeration will be used in areas where field conditions may interfere with the timely completion of the enumeration. These conditions may be high concentrations of multiunit buildings, enumerator safety concerns, low enumerator production rates, and so forth.
- A Be Counted National campaign will make unaddressed Be Counted questionnaires available in sites such as Walk-in Questionnaire Assistance Centers and other publicly accessible locations for

pick up and completion by people who believe that they have not been counted in the census.

- Mail response rates and maps will be available to local and tribal officials periodically during the census enumeration. They will work in partnership with census staff to identify unexpectedly low response areas. Targeted enumeration efforts and additional outreach and publicity activities then will be implemented.
- In partnership with local and tribal governments and community-based organizations, the local census offices will establish Walk-in Questionnaire Assistance Centers in their communities (for example, in non-English speaking areas) to assist respondents in completing their questionnaires. These centers will be established in community centers, large apartment buildings, and so forth.
- Assistance in various foreign languages will be provided for people who are not able to respond to questionnaires in English or Spanish.

### MILESTONES

March 2000	Open Walk-in Questionnaire Assistance Centers
March 31-April 12, 2000	Conduct Be Counted Campaign



**IX.G. VACANT HOUSING UNIT FOLLOWUP****OBJECTIVE**

To verify the accuracy of vacant housing unit information provided to the Census Bureau by the U.S. Postal Service (USPS).

**MAJOR FEATURES**

- A 30-percent sample of housing units designated as vacant by the USPS will be selected for followup during the nonresponse followup operation by census enumerators to determine if those units were truly vacant on Census Day. This will ensure the integrity of the vacancy information provided by the USPS.
- We also will gather information about the characteristics of those vacant housing units. Additional vacant units will be encountered by enumerators during nonresponse followup that were not designated as such by the USPS.
- As a final check, the consistency of the vacancy rates with independent estimates and historical data will be assessed.

**MILESTONES**

April-June 2000      Conduct vacant housing unit followup (as part of the nonresponse followup operation)

**IX.H. LARGE HOUSEHOLD FOLLOW-UP****OBJECTIVE**

To obtain Census 2000 data for all residents of households with more than five persons.

**MAJOR FEATURES**

Both short- and long-form census questionnaires will allow for up to five persons to provide census information about themselves. If the person filling out the questionnaire indicates that there are six or more persons in the housing unit, the Census Bureau will conduct a followup operation to obtain information for the additional residents.

**MILESTONES**

April-June 2000      Conduct large household followup

## IX.1. UNDUPLICATION OF RESPONSES

### OBJECTIVE

To eliminate duplicate addresses and questionnaires in Census 2000.

### MAJOR FEATURES

One of the main goals of Census 2000 is to make it simpler for people to be counted. In addition to our standard enumeration methodology for an area (for example, mailout/mailback data collection), census forms will be made readily available in public places and provided in multiple languages. Responses to the census also will be accepted over the telephone. Providing these response options will make it easier for persons to be counted but may increase the possibility that multiple responses will be submitted for a given person and household.

A complete, accurate address list, high speed data capture capabilities, along with automated matching technologies, will be the keys to avoiding the duplication of people and residences. The control of the enumeration of Census 2000 will be based on an address list called the Master Address File (MAF). Every housing unit in the census will have a unique identifier. Every response to the census will be data captured and then linked to an address in the MAF using powerful matching computer programs to assign the identifier. Once a response is linked to the MAF, we will be able to determine when multiple returns for a housing unit have been submitted. Matching tools again will be applied to identify and correct instances of duplicate counting of individuals.

Unduplication of multiple responses in past censuses would have required a massive clerical operation since only a small subset of person names was data captured. An automated matching capability was not feasible without the names of each of the persons on census forms. It would have been necessary to clerically compare the information on the individual forms and then feed the results into the computer.

Since the 1990 census, we have embarked on a path that will ensure timely, complete capture of all census responses. This includes the telephone call-ins of census responses, in addition to the commitment to use imaging technology with electronic optical mark and intelligent character recognition for the data capture of information from the paper forms. High speed capture will allow the Census Bureau to accelerate the process of capturing the names and demographic characteristics of all persons on the paper forms.

The advances in computer technology in the areas of computer storage, retrieval, and matching, along with image capture and recognition, have now given the Census Bureau the flexibility to provide multiple response options without incurring undue risk to the accuracy of the resulting census data.

As a further safeguard of the quality of the census enumeration, we will develop statistical procedures to identify areas from which we receive unusually large numbers of unaddressed Be Counted questionnaires and will verify the validity of the census responses.

### MILESTONES

June-July 2000

Conduct unduplication of multiple responses



## IX.J. COVERAGE EDIT

### OBJECTIVE

To improve the coverage of persons in housing units in Census 2000.

### MAJOR FEATURES

In Census 2000, a coverage edit will be performed to review Census 2000 questionnaires for potential missing people. After the Census Bureau receives the questionnaires, they will be checked to see if there is any discrepancy between the number of persons reported as members of that household and the number of persons for whom census information was provided on the form. For example, the respondent may have indicated that five people lived in the housing unit, but there was information for only two people. For these discrepancies, telephone clerks will call the household to resolve the problem. There will be no personal visit followup for households with reporting discrepancies that we cannot reach by telephone.

The coverage edit should not be confused with the quality check survey (Integrated Coverage Measurement), the edit and followup of large households, or the content edit (for missing or incomplete responses to population or housing items). (The content edit in Census 2000 will be completed solely by computer with no telephone or personal visit followup.)

### MILESTONES

March 2000	Identify housing units requiring coverage edit followup
March 2000	Conduct coverage edit followup operation

## IX.K. NONRESPONSE FOLLOWUP STRATEGY

### OBJECTIVE

The Census Bureau will make every effort to secure a response in Census 2000 from every resident and every housing unit. Following that, and to ensure an acceptable response among all census tracts, the Census Bureau will use statistical sampling to complete the enumeration in each census tract.

### MAJOR FEATURES

- During the initial response period (the period immediately before and immediately after Census Day), the Census Bureau will issue reminder publicity urging people to return their questionnaires, fill out Be Counted questionnaires, or use the telephone to provide their census responses.
- After the initial response period, the Census Bureau will determine the response rate for every census tract, which is a neighborhood that has an average of about 4,000 people. The response rate is defined as:

$$\frac{\text{Mail} + \text{Telephone} + \text{Other Responses}}{\text{Questionnaires Mailed or Delivered}} \times 100\%$$

- For any census tract in which this rate is less than 100 percent, the Census Bureau will select a sample of nonresponding addresses. The sample will vary from census tract to census tract based upon the particular response level and will be designed to achieve at least a 90-percent total response rate in each census tract.
- Enumerators will perform NRFU for each of the selected sample addresses. The addresses will be

visited by an enumerator who will complete a questionnaire by personal interview.

- The Census Bureau will not use sampling to complete the enumeration on American Indian reservations, or in Alaska Native Village statistical areas, the U.S. Virgin Islands, or the Pacific Island Areas.

#### **MILESTONES**

January 1997	Determined NRFU plan for Census 2000
April-June 2000	Conduct NRFU

### **IX.L. QUALITY CHECK (INTEGRATED COVERAGE MEASUREMENT) SURVEY**

#### **OBJECTIVE**

To produce a "one-number" census estimate of the U.S. population in Census 2000 that will improve accuracy, reduce costs, and eliminate confusion and controversy caused by having more than one number measuring the same population.

#### **MAJOR FEATURES**

In Census 2000, the Census Bureau will conduct a "one-number" census of population and housing. That is, there will be just one set of official census results produced by the legal deadlines. In recent past censuses, the population counts were represented by two sets of numbers: the number of people actually counted and the number of people estimated to be living in the United States, after compensating for enumeration errors. Figure IX-1 provides a summary of this process.

The quality check of Census 2000 results, known as the Integrated Coverage Measurement (ICM) Survey, will be composed of three phases:

- Housing Unit Phase
- Quality Check Computer Assisted Person Interview (CAPI) Phase
- Person Matching Phase

#### **Housing Unit Phase**

During this phase, housing units within the sample blocks will be listed independently of the census and later matched to the census inventory of housing units. After reconciling the differences, a list of housing units



that are confirmed to have existed within the sample blocks on Census Day will be prepared for conducting quality check computer assisted person interview.

#### **Quality Check Computer Assisted Person Interview Phase**

In this phase, the interviewer will collect information about the current residents and anyone who has moved out of the sample block between Census Day and the time of the interview. The interviewer will ask questions about alternate residences to establish where people lived on Census Day according to census residence rules. Interviews will be conducted either by telephone or personal visit. Telephone interviews will be conducted before the completion of the initial phase of the Census Nonresponse Follow-up operation for the sample area, but will include only a sub-set of households in the sample area that, in addition to meeting other established criteria, returned their census questionnaires and provided their telephone numbers. After the conclusion of the Census Nonresponse Follow-up operation for a sample area, all remaining sample cases will be interviewed using a CAPI person-to-person approach. Telephone interviews may also be used later in the process for hard to enumerate areas or situations.

#### **Person Matching Phase**

In this phase, the people counted in the quality check survey will be compared with those enumerated in the census. After the matching is completed, a field CAPI Person Follow-up interview is conducted for reconciling selected cases. After this person phase is completed, using statistical procedures, the Census Bureau will produce estimates of people missed or duplicated in the

census enumeration. These estimates then will be used to update the final census data files to produce the one-number census results.

#### **MILESTONES**

April 1999	Select quality check sample
July-December 1999	Conduct housing unit listing phase
January-March 2000	Conduct housing unit matching and followup phase
April-July 2000	Conduct quality check person interviewing phase
July-September 2000	Conduct person matching and followup phase
October-November 2000	Conduct missing data and estimation procedures
December 2000-March 2001	Create P.L. 94-171 redistricting data products

## Figure IX-1. The Path to a One-Number Census

(Chart Omitted)

### IX.M. POTENTIAL EFFECT OF NONRESPONSE FOLLOWUP AND QUALITY CHECK (INTEGRATED COVERAGE MEASUREMENT) SAMPLING OPTIONS

The Census 2000 plan calls for the innovative use of statistical sampling for conducting two major census operations. These operations are sampling for nonresponse followup (NRFU) and for a quality check called Integrated Coverage Measurement (ICM). These two operations have different goals, but they complement each other.

Sampling for nonresponse will be used to complete the census enumeration. This is a major departure from the process used in previous censuses. Rather than visiting all households that do not provide a response during the initial response period, census enumerators will visit and conduct interviews for a representative sample of those households. Information collected during this operation will be used to estimate the characteristics of the households not included in the sample.

After completion of census NRFU operations, we will conduct a follow-up survey of a representative sample of housing units across the nation. This operation is referred to as the census quality check or ICM survey. This survey is designed to identify people missed in enumerated housing units and in missed housing units, as well as identifying people that were counted in the wrong place or more than once during the initial census enumeration.

The final population estimates are the result of combining information collected from responses to the census, including mail returns and other opportunities to respond (such as on the Be Counted questionnaires or



by phone) with results from the census NRFU and quality check operations.

Because the nonresponse and quality check operations are sample-based, they contribute error to the census population estimates. This error is referred to as **sampling error**. Conversely, the quality check operations should result in a reduction of the largest source of error in previous censuses, coverage error. Coverage error occurs differentially across geographic areas and among different population groups. This error is more commonly referred to as the **undercount**.

Table IX-1 provides a comparison of the 1990 census undercount rates with the potential sampling error for Census 2000 for major racial and ethnic groups for the United States. The two statistics provided for each estimate are as follows:

- Estimated coefficients of variation (CV) for Census 2000 estimates, which account for the error contribution from the nonresponse and quality check sampling operations. A coefficient of variation expresses the error (sampling) as a percent of the population estimate. These estimates are based on an empirical simulation using data from the 1990 PES to approximate the results of the 2000 ICM, and will be refined as the ICM design is further developed.
- Undercount rates for the 1990 census, as measured by the 1990 Post-Enumeration Survey. An undercount rate expresses the error (nonsampling) as a percent of the population estimate.

For example, Table IX-1 shows that the 1990 census missed 5.0 percent of the Hispanic population in the United States. The implementation of the Census 2000

plan will introduce a sampling error of 0.8 percent for the Hispanic population but will remove the coverage error for a net improvement of about 4.2 percent.

**TABLE IX-1. POTENTIAL EFFECT OF NONRESPONSE FOLLOWUP AND QUALITY CHECK SAMPLING OPTIONS ON ESTIMATES OF THE U.S. POPULATION AND THE MAJOR RACIAL/ETHNIC GROUPS**

	Census 2000	1990 Census
Race	Estimated sampling error (coefficient of variation)	Undercount Rate
United States, total	0.1%	1.6%
White, non-Hispanic	0.1%	0.7%
Black	0.6%	4.4%
Asian and Pacific Islander	1.4%	2.3%
American Indian	1.4%	4.5%
Hispanic origin (may be of any race)	0.8%	5.0%

## IX.N. DEMOGRAPHIC ANALYSIS

### OBJECTIVE

To use independent estimates to validate the quality check estimates and the "one-number" census results in Census 2000.

### MAJOR FEATURES

Demographic analysis (DA) represents a macro-level approach to measuring coverage. The demographic approach differs fundamentally from the quality check estimates, which represent a micro-level approach (case-by-case matching).

Demographic estimates of net undercount are derived by comparing census results to estimates based largely on aggregate administrative data. The national estimates for the population below age 65 are derived by the basic demographic accounting equation:

$\text{Population} = \text{Births} - \text{Deaths} + \text{Immigrants} - \text{Emigrants}$

Aggregate medicare data are used to estimate the population 65 years and over. To produce estimates below the national level, the equation is modified to allow for domestic migration. Since administrative records are utilized, the DA estimates are derived independently of the census being evaluated.

*Use of Demographic Analysis in Census 2000* - Demographic analysis will provide checks at two distinct points in the Census 2000 process. First, DA will be compared with preliminary census results before the quality check operation to provide an early assessment of coverage differentials at the national and state levels. Second, the DA estimates will be used to validate the quality check estimates and ensure the

demographic consistency of the final one-number census results.

Below the state level, we will use independent population and housing estimates, aggregate administrative records, and other analytic tools as benchmarks to assess the quality of the evolving census results. In addition to broad coverage checks of population and housing, this review can identify content problems and possible anomalies due to geocoding and other nonsampling errors.

### MILESTONES

August 1998	Implement features of DA in Dress Rehearsal
February 2000	Evaluate quality/completeness of MAF
August 2000	Evaluate quality/completeness of "pre-quality check" census results
December 2000	Validate quality check estimates and one-number census results



United States  
CENSUS  
2000

**Section X.  
American Indian  
and Alaska Native  
Areas and Hawaiian  
Homelands**

**X. AMERICAN INDIAN AND ALASKA NATIVE  
AREAS AND HAWAIIAN HOMELANDS**

**OBJECTIVE**

To conduct the best possible enumeration in Census 2000 of American Indian and Alaska Native Areas (AIANA) and Hawaiian Homelands.

**MAJOR FEATURES**

The Census Bureau will base its strategy for enumerating the populations in AIANA and in Hawaiian Homelands on building partnerships for:

- Address list development
- Geographic programs
- Outreach and promotion
- Field operations
- Data collection methodologies
- Data processing and dissemination

**Address List Development**

In areas where the U.S. Postal Service (USPS) delivers mail to city style addresses, we will use the USPS Delivery Sequence File to build the address list and use the mailout/mailback methodology for enumeration. In other areas, we will conduct an address listing operation prior to the census and use the update/leave with respondent mailback of the questionnaire methodology. In more remote areas, we will use the list/enumerate methodology. Tribal governments will have an opportunity to review the address list for their jurisdiction as part of the LUCA program. (See page VI-5.)

### **Geographic Programs**

Table X-1 shows the wide diversity of programs the Census Bureau will offer American Indian tribes, Alaska Native areas, and Hawaiian Homelands to review and define geographic areas.

### **Outreach and Promotion**

Census Bureau staff and tribal liaisons will compile a listing of all electronic and print media within the marketing area for paid promotion dissemination. In addition, the Census Bureau will seek the help of tribal liaisons and Complete Count Committees (if the tribes form them) to assist with outreach (census awareness and education) and the promotional campaign, using national or local materials.

### **Field Operations**

The Census Bureau plans to obtain assistance with the following activities:

- Provide local office space for testing and training
- Participate in training local census office staff (such as in cultural awareness)
- Assist in recruiting strategies for filling census jobs and identifying local referrals for assistance
- Assist and advise census field staff about potential problem situations
- Attend and participate in periodic census/tribal staff meetings
- Identify sites for Questionnaire Assistance Centers
- Identify locations for distributing Be Counted questionnaires

### **Data Collection Methodologies**

The Census Bureau will work with tribal officials to select the appropriate data collection methodology or combination of methodologies for each area. These methodologies will range from the use of mailing lists with the respondent either receiving a questionnaire in the mail (mailout/mailback) or an enumerator leaving the form for the respondent to return by mail (update/leave) to the enumerator listing the housing unit and conducting the census interview in one visit (list/enumerate).

### **Data Processing and Dissemination**

Census 2000 data collected in the AIANA and the Hawaiian Homelands will be processed and disseminated in the same way as information collected for the rest of the Nation. (See page XII-1.)

### **MILESTONES**

September 1998	Complete holding tribal consultation meetings
April 2000	Complete definition of geographic areas.



Table X-1. Census 2000 Geographic Programs for American Indian and Alaska Native Areas and Hawaiian Homelands

Geographic Program	Type of Area	Purpose of Program
Tribal Review Program	Federally recognized tribes with a land base	Provide boundary and feature updates
Block Definition Project	Federally recognized tribes with a land base and Federally recognized tribes in Oklahoma without a land base	Identify Census 2000 block boundaries
Participant Statistical Areas	Federally recognized tribes with a land base and Federally recognized tribes in Oklahoma without a land base	Define statistical areas such as census tracts, block groups, census designated places, and census county divisions
Tribal Subdivision Program (Proposed)	Federally recognized tribes with a land base	Designate special subdivisions (NEW)
Tribal Jurisdiction Statistical Area Program	Federally recognized tribes in Oklahoma without a land base	Delineate an identifiable land area as a tribal jurisdiction statistical area
Tribal Designated Statistical Area Program (Proposed)	Federally recognized tribes outside Oklahoma without a land base	Delineate an identifiable land area as a tribal designated statistical area
Alaska Native Regional Corporation Program	Alaska Native areas	Alaska Native Regional Corporations review and update boundaries

Alaska Native Village Statistical Area Program	Alaska Native areas	Alaska Native Regional Corporations delineate, review, and update boundaries for these areas
State Reservation Program	State recognized tribes with a land base	State government liaison can review and update boundaries
State Designated American Indian Statistical Area Program (Proposed)	State recognized tribes without a land base	Replaces 1990 Tribal Designated Statistical Area program for state recognized tribes
Hawaiian Homelands (Proposed)	Areas recognized by the Department of Hawaiian Homelands	New program to identify and include Hawaiian Homelands in TIGER data base

April 1998

United States  
CENSUS  
2000

**Section XI.  
Telecommunications  
Support and  
Automated Data  
Processing**

**XI.A. TELECOMMUNICATIONS SUPPORT**

**OBJECTIVE**

To provide the infrastructure necessary to support the Census 2000 telecommunications requirements.

**MAJOR FEATURES**

The planned Census 2000 telecommunications network will encompass communication links between the following facilities:

- Census Bureau Headquarters in Suitland, Maryland
- 12 Regional Offices (ROs)
- Bowie, Maryland Computer Center
- 12 Regional Census Centers (RCCs)
- Jeffersonville, Indiana Data Capture Center (DCC)
- 3 contracted Data Capture Centers (DCCs)
- Approximately 520 Local Census Offices (LCOs)

In addition, we intend to establish communication links to the planned opening of commercial telephone centers to support Telephone Questionnaire Assistance.

Figure XI-1 shows the Wide Area Network (WAN) diagram for Census 2000. We plan to use Asynchronous Transfer Mode (ATM) as our communications link (via frame relay or another type of dedicated link) between Headquarters, Bowie Computer Center, and the DCCs. The ROs, RCCs, and LCOs will be linked to the frame relay cloud (the communications network provided by the telephone company) via leased T1 communication lines.



**MILESTONES**

Define telecommunications requirements for:

Currently operational	Bowie Computer Center
October 1995-April 1997	Regional Census Centers
January 1996-March 1997	Jeffersonville Data Capture Center
January 1996-March 1997	Contracted Data Capture Centers
July-September 1997	Local Census Offices

**Figure XI-1. Census 2000 WAN DIAGRAM**

## **XI.B. DATA CAPTURE SYSTEM**

### **OBJECTIVE**

To utilize the best available data capture methodology in Census 2000.

### **MAJOR FEATURES**

The Census 2000 data capture methodology must utilize the best available technology that will accommodate the use of respondent-friendly questionnaires. The Census Bureau has identified components of the data capture process that may be best performed and provided by private-sector partners. The Census Bureau will be able to take advantage of available commercial off-the-shelf hardware and software representing technological advancements in information technology and systems without limiting itself to creating in-house solutions.

The following are the most significant features of the Data Capture System 2000 (DCS 2000):

- Four centers will be responsible for data capture and data processing functions.
- A full electronic data capture and processing system will record an image of every questionnaire.
- Mail-return questionnaires will be sorted automatically to ensure timely conversion and capture of critical information needed before nonresponse follow-up activity begins.
- Optical mark recognition (OMR) will be used for all check-box data items.
- Intelligent character recognition (ICR) will be used to capture write-in character-based data items.
- Key-from-image will capture and/or resolve difficult ICR cases.

- Quality assurance will be conducted on data keying and scanning activities.
- Paper questionnaires will be handled only at the beginning of the data capture process: during check-in, forms preparation, and scanning. To the maximum extent, all subsequent operations will be accomplished using the electronic image and captured data, reducing the logistical and staffing requirements for handling large volumes of paper questionnaires.

### **MILESTONES**

March 1997	Awarded Data Capture System 2000 contract
March 1997-May 1997	Prepared system development plan
March 1997-June 1997	Prepared operations and facilities plan
March 1998-July 1998	Demonstrate plan
January 1998-June 1998	Finalize Operation Facility Plan
January 1998-September 1999	Open data capture centers/install equipment
March 2000	Begin data capture of Census 2000 forms



## XI.C. AUTOMATED DATA PROCESSING SYSTEM

### OBJECTIVE

To develop an effective and efficient system for controlling, managing, and processing Census 2000 data.

### MAJOR FEATURES

The Census 2000 Data Processing System will be a complex network of operational controls and processing routines intended to store and service the decennial control and data requirements. It will include the necessary interactions with the Master Address File (MAF), Operations Control System (OCS) 2000, Data Capture System 2000 (DCS 2000), and Telephone Questionnaire Assistance (TQA), not only to control, accept, and store the data but also to provide the necessary computer processing to produce a one-number census.

The Census 2000 Data Processing System is divided into three operational phases of precensus, census, and post-census activities.

- Precensus activities will be those required for converting the MAF into the decennial control data base that remains linked to both TIGER®\* and the MAF. These activities will include form sampling (long or short), targeting identifications (for example, with foreign language questionnaires), and preparing the address files for printing on the questionnaires. Control information (both geographic and address related) will be provided to the OCS 2000 for guiding both field canvassing and address capture processing.

\*TIGER® is a registered trademark of the U.S. Bureau of the Census.

- Activities concurrent with census data collection/capture will be those necessary to coordinate the check in and storage from the multiple sources of collection (DCS 2000, Be Counted questionnaires, and telephone), to define the responding/nonresponding universes, and to provide enumeration controls and workload to the field. Included in these activities will be the loading and updating of the central data bases for the storage of all census responses provided through the enumeration and data capture processes.
- Post-census activities will be those necessary to prepare data from the original responses for release. These activities will include unduplicating multiple responses, editing and imputation, coding of write-in response data (such as race, language, industry and occupation, place of work/ migration), estimation, tabulation recoding, and data disclosure avoidance.

In addition, detailed data files will be prepared from information collected on the short- and long-form questionnaires. These activities will include editing the responses, applying statistical techniques to account for missing data, and applying weights to sample records from the long form questionnaires. The files will be provided to DADS for data dissemination.

**MILESTONES**

July 1999	Receive the Census 2000 MAF
September 1999	Send initial address files to printing contractors
April 2000	Define nonresponse followup universe and samples
May-August 2000	Code write-in response data
August-September 2000	Process 100-percent edits and imputations
September 1999-January 2001	Process 100-percent estimations, disclosure avoidance, and tabulation recoding
December 2000-January 2001	Provide 100-percent estimated and edited files to DADS
June-August 2001	Prepare detailed data files from information collected on long-form questionnaires and provide to DADS

United States  
**CENSUS**  
2000

**Section XII.**  
**Dissemination**  
**and Products**



## **XII.A. TABULATION AND DISSEMINATION PROGRAM**

### **OBJECTIVE**

The Tabulation and Dissemination Program for Census 2000 will be significantly different from those of previous censuses. By taking advantage of new technology, the Census Bureau will be able to meet customer demand for faster and more flexible access to census data.

### **MAJOR FEATURES**

Census 2000 data will be disseminated mainly using the Data and Access Dissemination System (DADS). Still in the developmental stages, DADS will provide an interactive electronic system that will allow data users to access prepackaged data products, data documentation, and on-line help, as well as build custom data products on-line and off-line. Figure XII-1 depicts the various products available through DADS.

Certain data products—such as those including summary, profile data—will be disseminated in traditional media as well as through DADS. The options and issues related to determining the types of data products and their medium of dissemination have been discussed with various segments of the data user community; these consultations will continue until the final decisions are made. The Census Bureau has solicited the advice and recommendations of data users throughout the planning, design, and testing stages of DADS.

DADS will be accessible to the widest possible array of users through the Internet, Intranet, and all available intermediaries, including the nearly 1,800 Data Centers

and affiliates, the 1,400 Federal Depository libraries and other libraries, universities, private organizations, and so forth.

DADS is being designed with the capability to:

- Provide access to Census 2000 data such as the type of information shown in 1990 census Summary Tape Files (STFs) and Public-Use Microdata Samples (PUMS). Data users will have online viewing, downloading, and ordering capabilities.
- Create customized products, including various display formats such as tables, charts, graphs, and maps based on Census Bureau or user-defined geographic areas.
- Furnish metadata that provides documentation and explanatory information for data subjects and geographic areas.
- Provide users with an on-line help feature for using the system and accessing census data, as well as instructions on how to seek further assistance.

There are many issues concerning Census 2000 data dissemination that we must resolve in-house and with the data user community. We plan to work with data users during the next couple of years to answer two broad questions (as well as some more detailed issues) that will help finalize the overall design of the 2000 Tabulation and Dissemination Program. The questions are as follows:

1. Since data can be downloaded by data users from DADS onto other media (for example, CD-ROM, diskette, and paper), what proportion of Census Bureau resources should be used to generate CD-ROMs and

printed reports? (Should any other media be considered?)

2. Since some segments of the data user community have less access to computers, how should their data needs be met and how can the Bureau work with partners and stakeholders to provide access for these data users?

Also, data users will be asked for recommendations on the types of data to be predefined in DADS and included in various data products. Our ongoing channels of communication will continue to inform them on the progress of DADS, such as through meetings and workshops with specific groups and organizations, and articles in census publications.

#### **MILESTONES**

September 30, 1996	Released DADS Prototype 1, "proof of concept" for basic design, technology, and functionality of DADS
October 31, 1997	Released DADS Prototype 2, with expanded functions such as data product creation and on-line help
January-April 1999	DADS begins release of Dress Rehearsal product prototypes for Census 2000 (redistricting data first, other 100-percent and sample data to follow)
January 2001	DADS begins release of Census 2000 redistricting data products
March 31, 2001	DADS completes release of redistricting data to states

## **XII.B. P.L. 94-171 REDISTRICTING DATA PROGRAM**

### **OBJECTIVE**

To satisfy the requirements for Public Law (P.L.) 94-171, the Census Bureau established the Census 2000 Redistricting Data Program. This program offers the redistricting officials in each state the opportunity to provide the information used by the Census Bureau to create the geography for tabulating their redistricting data. By using the state-provided geographic information, the Census Bureau can furnish redistricting data and related geographic products that enable the states to complete Federal and state redistricting according to their specific state deadlines.

### **MAJOR FEATURES**

The Census 2000 Redistricting Data Program consists of:

**Phase 1, the Block Boundary Suggestion Project**, offers state redistricting officials the opportunity to identify visible features that they suggest be held as Census 2000 block boundaries. The Census Bureau will identify these boundaries in its TIGER®\* data base and, once agreed upon, hold them as block boundaries for tabulation of Census 2000.

**Phase 2, the Voting District Project**, is the phase where state redistricting officials may submit the boundaries and geographic codes of the voting dis

\*TIGER® is a registered trademark of the U.S. Bureau of the Census. For ease of presentation, the trademark symbols for TIGER and TIGER-related products are omitted from the text.



tricts (election precincts) and state legislative districts using whole census blocks. The Census Bureau will insert these boundaries into the TIGER data base.

**Phase 3, Release of Census 2000 Redistricting Data**, is the dissemination of Census 2000 data and accompanying geographic products to the governor and majority and minority legislative leaders responsible for redistricting in each state. States that provided voting districts will receive their data tabulated by voting district. States that provided state legislative districts will receive their data tabulated by state legislative district. The products, in paper and electronic form as appropriate, include:

- Data files for standard tabulation areas (for example, county, city, census tract), census block, and—when provided by the state—voting districts and state legislative districts: broken down by major race groups and Hispanic origin, for the total population and for persons 18 years and over
- TIGER/Line files (including voting districts and state legislative districts when provided by the state)
- County Block Maps (displaying voting districts when provided by the state)
- Voting District Outline Maps (displaying state legislative districts when provided by the state)
- Census Tract Outline Maps
- *Congressional District Atlas*, 108th Congress of the United States, in digital form and as a printed report, including a series of maps and tables from the TIGER data base for the districts of the 108th

Congress resulting from the Census 2000 reapportionment

- Wall map of the United States by the Congressional Districts of the 108th Congress

The Census Bureau is required by P.L. 94-171 to deliver redistricting data/geographic products to the states within one year after Census Day. Individual states have their own timing requirements for the completion of state and Federal redistricting. Priority processing of census data and geographic products will be given to those states that must complete redistricting early.

#### MILESTONES

January 1999	Complete Phase 1, Block Boundary Suggestion Project
January 1999	Begin Phase 2, Voting District Project
March 31, 2001	Complete Phase 3, release of P.L. 94-171 redistricting data/geographic products to states
January 2003	Release <i>Congressional District Atlas</i> , 108th Congress

## XII.C. GEOGRAPHIC PRODUCTS

### OBJECTIVE

The requirements for Census 2000 are not just to collect, tabulate, and disseminate data, but to relate these data to geographic entities. Data for smaller geographic areas are necessary to meet the requirements of redistricting and numerous other Federal, state, and local programs. So that data users may understand and effectively use census data, the Census Bureau provides geographic products and appropriate tools to identify the names, boundaries, codes, and other attributes of the geographic entities.

### MAJOR FEATURES

The names, boundaries, and attributes of the geographic entities for which we tabulate data are identified through a variety of means, including internal Census Bureau operations and participant programs with state, local, and tribal governments and regional and metropolitan planning agencies. We also work with these participants to update the features—including their names and address ranges—shown in our geographic data base.

We incorporate the information relating to the geographic entities and features into the TIGER®\* data base. We prepare extracts from TIGER for use in conducting the census and in tabulating and disseminating census data. (Special geographic extracts from the TIGER data base will support DADS.)

\*TIGER® is a registered trademark of the U.S. Bureau of the Census. For ease of presentation, the trademark symbols for TIGER and TIGER-related products are omitted from the text.

The geographic products planned for Census 2000 are:

- Maps, in digital and hardcopy form. These will include detailed maps (such as the County Block Maps), outline maps (such as the Census Tract Outline Maps), and thematic maps (such as percent of population by county for a specific racial category). We also will generate supporting maps based on a specific data product.
- TIGER Extracts, in digital form (hardcopy may be available). These will include such products as the TIGER/Line files, cartographic boundary files and comparability files. We will generate appropriate supporting TIGER extracts based on specific data products and to support noncensus programs (for example, the TIGER/Census Tract Street Index for the Home Mortgage Disclosure Act).

The geographic entities we report in data products vary. Some geographic entities—and related products—remain constant across data products. Other geographic entities are relevant at different times and in different products. For example:

- Voting districts are a very important geographic entity for P.L. 94-171 geographic products but are not included in the “regular” census products. We prepare special maps and geographic products showing these areas.
- While 100-percent data (from the questions asked of all persons) are available for census blocks, sample data (from the long form) are not. Similarly, some data files will not include certain geographic entities or geographic entities below a certain population (for example, places with populations of fewer than 10,000).



- Reapportionment from Census 2000 will be reflected in the redistricting for the 108th Congress. Initial data files for Census 2000 will contain the districts of the 106th Congress.

#### **MILESTONES**

March 31, 2001	Release products for Redistricting Data Program to states
April-May 2001	Release Census 2000 TIGER/Line files
June 2001	Release county block maps, census tract outline maps, county subdivision outline maps
June 2003	Complete release products for districts of 108th Congress

Figure XII.I Data Access & Dissemination System

[DADS]

United States  
CENSUS  
2000

**Section XIII.  
Testing,  
Dress Rehearsal,  
Evaluation, and  
Research**

**XIII.A. CENSUS 2000 TESTS AND RESEARCH**

**OBJECTIVE**

The Census Bureau is engaged in an ambitious testing and research program designed to develop new approaches and techniques for possible implementation in Census 2000. The ultimate goal of this program is to boost participation in the census, thereby improving coverage and reducing costs.

**MAJOR FEATURES**

- Even before the 1990 census data products were completely released, the Census Bureau initiated many tests and research projects (such as focus group and cognitive studies), spanning from 1992 through 1994. Earlier testing was needed to allow time to study fundamental reforms in census design. The following is a summary of these efforts:
  - The earliest tests and research focused on ways to increase the willingness and ability of respondents to respond by mail to the census by using: (1) questionnaire design and mailing package formats that were easier for respondents to understand and complete; and (2) notifications for alerting and reminding respondents to complete the forms.
  - Various testing and research studies were conducted concerning technologies to speed data collection and on ways to give people greater flexibility in how they respond to the census. Other research assessed current and emerging data capture technologies (for example, electronic imaging and optical mark recognition)



that would offer the potential for processing cost reductions.

- Research on automated address list maintenance focused on supporting the development of a continuously updated Master Address File linked to the TIGER data base.
- Considerable testing and research were conducted to study administrative records including: examining respondent attitudes about using records held by other agencies, assessing public reaction to collecting social security numbers, investigating various state and local administrative records systems, creating a data base of sources of administrative records, and developing effective methods to use when importing, standardizing, and matching files.
- Then at mid-decade, the 1995 Census Test gave further testing to many procedures and features that had been shown to be successful in the earlier tests and research, along with additional test objectives. This test evaluated 15 activities, among them a multiple mail strategy with respondent-friendly forms, new methodology to count persons with no usual residence, techniques of sampling for nonresponse, mail strategy of Spanish-language forms to targeted areas, and the collection of long-form (sample) data using various length forms (to see how response rates were affected by form length).
- Ongoing cost modeling research developed statistical models using data available from the various census tests being conducted. This research experimented with the prediction of many

variables, such as census response, data collection workloads, and staff sizing of local census offices.

- The 1996 National Content Survey (formally known as the U.S. Census 2000 Test) was the principal vehicle for testing and evaluating subject content for Census 2000. It also provided information on questionnaire design and mailing strategy, and techniques to improve coverage.
- The 1996 Race and Ethnic Targeted Test (formally known as the 1996 Census Survey) was the principal vehicle for testing and evaluating several major alternatives for asking the race and ethnic questions. It studied how the proposed alternatives affected the distribution and quality of responses compared with the 1990 questions.
- The 1996 Community Census tested various features of the quality check (Integrated Coverage Measurement Program) on two American Indian reservations and in an urban site. Some of these features included techniques for measuring coverage in housing units and noninstitutional group quarters, use of administrative records for coverage improvement, and experimental questions designed to enhance address listing procedures.

### **XIII.B. CENSUS 2000 DRESS REHEARSAL**

#### **OBJECTIVE**

The purpose of the Census 2000 Dress Rehearsal is to prove-in all the various operations, procedures, and questions that are planned for Census 2000 under as near census-like conditions as possible.

#### **MAJOR FEATURES**

The Dress Rehearsal will provide for operational testing of Regional Census Center, Local Census Office, and Data Capture Center procedures and systems planned for use in Census 2000. We will employ the full array of methods, techniques, materials, work flows, equipment applications, and promotion and outreach programs intended for use in Census 2000. Attachment C provides more detail about the methods used in the Dress Rehearsal sites.

New procedures being considered for Census 2000—such as respondent-friendly forms readily available in many locations, multiple mail contacts with each household, digital capture of forms, and statistical estimation techniques—have all been tested individually in earlier operations. The Dress Rehearsal will provide a census-like environment to test simultaneously those procedures planned for use in Census 2000. The Dress Rehearsal also may include some procedures and systems that have not been tested operationally in any prior field or processing activity because they are needed to meet new requirements.

The Census Bureau plans to launch an unprecedented partnership effort for the Dress Rehearsal and Census 2000. For the Dress Rehearsal, the Bureau intends to work closely with state, local, and tribal governments,

community organizations, and others to conduct a wide range of census activities. For example, the Bureau will ask local and tribal governments to review the Master Address File to ensure its completeness and accuracy. Other partnership efforts will include working closely with local and tribal governments in implementing the promotion and outreach program, and to facilitate the availability of census questionnaires. The Dress Rehearsal communities will work with the Bureau as exclusive partners in the final evaluation of planned Census 2000 operations.

From the Dress Rehearsal, we will produce prototype redistricting data products required by P.L. 94-171, and minimal standard printed and machine-readable 100-percent and sample data products.

#### **Sites**

The Census Bureau has selected three sites for the Census 2000 Dress Rehearsal. The sites are the city of Sacramento, California; 11 counties in an area near and including the city of Columbia, South Carolina; and the Menominee American Indian Reservation, Wisconsin. The combination of a large urban site, a small city-suburban-rural site, and an American Indian Reservation site will provide a comprehensive testing environment for refining planned Census 2000 methodology. These three sites reflect characteristics that we believe will provide a good operational test of Census 2000 procedures and systems.

- **Sacramento, California**

This site consists of the city of Sacramento, which had a 1990 census resident population of 369,365 and 153,362 total housing units. The Census



Bureau's official 1994 estimate showed an increase in the city's population to 373,964.

Sacramento contains great racial and ethnic diversity, including significant African American, Hispanic, and Asian and Pacific Islander populations. This diversity will allow us to test proposed Census 2000 methods designed to reduce the differential in the count and produce an accurate census for all components of the population. Sacramento is also a primary media market, which will allow us to implement a prototype of the Census 2000 advertising program. The site, representing the size of a typical urban local census office in Census 2000, will provide an understanding of the effectiveness of census operations and systems in this environment.

- Columbia, South Carolina

This site contains the city of Columbia in its entirety, including a small portion in Lexington County; the town of Irmo in its entirety, which is in Richland and Lexington Counties; and the following contiguous counties in north central South Carolina:

Chester	Kershaw	Newberry
Chesterfield	Lancaster	Richland
Darlington	Lee	Union
Fairfield	Marlboro	

The 1990 census found that the counties comprising the Columbia site had a resident population of 650,035 and 251,874 total housing units. Our official 1996 estimates showed an increase for the 11 counties to 671,234 persons and 290,095 housing units.

The Columbia site exhibits the characteristics of a small city-suburban-rural area that contains living situations and socioeconomic characteristics that we do not find in a predominately urban environment. This site provides our only opportunity to test procedures for developing a Master Address File in an area containing both city style addresses (house number and street name) and non-city style addresses (rural route or box number). The site offers a mix of difficult and presumably easy-to-enumerate areas in a suburban and rural setting.

In the Columbia site, we will not use sampling and estimation techniques to produce the census counts. Instead, we will conduct a 100 percent followup of households that do not respond by mail or telephone. We also will conduct a post enumeration survey (PES) in the Columbia site to evaluate the accuracy of the results only. Attachment C provides more details about this alternative methodology.

- Menominee American Indian Reservation, Wisconsin

The Menominee American Indian Reservation is located in northeastern Wisconsin. Based on the 1990 census, the Menominee Reservation had a resident population of 3,397 and 1,176 total housing units. Menominee County had a 1990 resident population of 3,890 and 1,742 housing units. (The Menominee Reservation and Menominee County share the same exterior boundary, but pockets of interior land totaling over 2 square miles that are part of the county are excluded from the reservation. The Dress Rehearsal will include the entire

county, however.) The Census Bureau's official 1996 estimates for Menominee County showed an increase to 4,609 persons and 1,899 housing units.

Conducting the Dress Rehearsal on an American Indian reservation allows the Census Bureau to test proposed Census 2000 methodologies for reducing the differential in the count among this component of the population. The Menominee Reservation has a high proportion of American Indians living on it and was recommended by the Census Advisory Committee on the American Indian and Alaska Native Populations.

#### **MILESTONES**

August 1997	Address lists developed and updated
October 1997	Address lists reviewed and corrected by local and tribal officials
December 1997	Local census offices opened
April 18, 1998	Census Day
July 1998	Complete census data collection
November 1998	Complete quality check/PES data collection
November 1998	Complete census and quality check/PES processing
December 1998	Release site counts
January 1999	Release prototype P.L. 94-171 redistricting products
March 31, 1999	Complete Dress Rehearsal evaluations

### **XIII.C. QUALITY ASSURANCE**

#### **OBJECTIVE**

To detect and correct performance errors that can significantly affect coverage and data quality.

#### **MAJOR FEATURES**

Census 2000 Quality Assurance (QA) activities will cover critical precensus, data collection, and data processing operations. QA plans will be developed for the following activities:

- Field geocoding
- Field address listing, validation, and/or map spotting
- Printing of public use forms
- Input materials
  - Map production
  - Assembly kits - materials used by enumerators in the field
- People-assisted data collection operations
  - Personal field interviewing
  - Computer Assisted Personal Interviewing
  - Computer Assisted Telephone Interviewing
- Data Capture modes
  - Intelligent character recognition
  - Optical mark recognition
  - Keying from paper
  - Keying from imaging
  - Scanning
  - Digitizing
- Clerical or automated matching and coding



Each of these operations is designed and implemented to meet decennial objectives. The QA is tailored not only to eliminate significant nonsampling errors, but also to be integrated efficiently into the operation work flow.

#### **MILESTONES**

January 1998-January 1999	QA on geographic support activities (geo-coding, digitizing, and map production)
August 1998-July 1999	QA on address listing and validation
July 1999	QA on printing public use forms
April 2000	QA on people-assisted data collection
April 2000	QA on data capture operation

#### **XIII.D. CENSUS 2000 EVALUATION PROGRAM**

##### **OBJECTIVES**

To obtain information about the quality of Census 2000 data and to provide information for future census planning.

##### **MAJOR FEATURES**

Evaluations of key components of Census 2000 will be planned before and implemented during the Census 2000 process. Evaluation results will be released in the form of a Report Card on Census 2000. The Census Bureau intends to release certain components of the Report Card by December 31, 2000.

The components of Census 2000 to be evaluated will fall into three broad categories:

- Quality check evaluations
- Coverage improvement evaluations
- General evaluations

**MILESTONES**

January 1998-	Define components of Census 2000 Dress Rehearsal Report Card.
January 1999	Release Census 2000 Dress Rehearsal Report Card
April 1999	Finalize plan for Census 2000 Report Card. This plan will reflect what we learned from the Census 2000 Dress Rehearsal Report Card as well as from our many internal/external consultations.
October 1999- December 2000- January 2001	Implement evaluation studies Issue Census 2000 Report Card with or shortly after release of the Census 2000 counts by December 31, 2000.
Beyond January 2001	Some evaluation studies may be prepared and issued.

### **XIII.E. RESEARCH AND EXPERIMENTATION PROGRAM**

**OBJECTIVE**

To conduct a program of research and experimentation during the Census 2000 cycle that will provide information for planning the 2010 census.

**MAJOR FEATURES**

As part of each decennial census since 1950, the Census Bureau has incorporated a research program to gather data needed to facilitate planning for the next census. For Census 2000, the Census Bureau will conduct experiments and research on different aspects of decennial census activities to assess alternative methods that may be considered in planning the 2010 census. These research activities will be coordinated and managed in a comprehensive research program.

The process for managing this program will involve the following:

- Develop criteria for selection of research
- Solicit ideas for research
- Review proposals and select research based on pre-identified criteria and resources
- Ensure that implementation of research is coordinated with all participating Census Bureau divisions
- Monitor budget and schedules for research
- Review results and coordinate the documentation of results into a Census 2000 results memorandum series



**MILESTONES**

September 1997	Defined selection criteria for research and experimentation program
November 1997	Solicited ideas for research and experimentation
March 1998	Identify experiments to be included
October 1998-December 2000	Implement experiments
January 2001-December 2003	Document results of research and experiments

**XIII.F. ADMINISTRATIVE RECORDS****OBJECTIVE**

To explore the feasibility of using administrative records in decennial censuses.

**MAJOR FEATURES**

The Census Bureau is evaluating the feasibility of using administrative records to supplement or improve traditional data collection methods. The Census Bureau plans to include an experiment in Census 2000 in parallel with standard methods to provide a basis for analysis and future decision making with regard to an expanded use of administrative records in the 2010 census. To support this experimentation, the Census Bureau will develop an administrative records system using selected federal records.

Developing an administrative records system for experimentation in Census 2000 involves the following:

- Identify and acquire administrative record files from selected national programs that contribute to coverage and to demographic characteristics
- Develop methods to evaluate the quality of the administrative record system and the component files
- Develop methods for generating national level administrative record files
- Conduct experiments in Census 2000 to support planning for the 2010 census

An administrative records research agenda has been established to identify relevant issues and the corresponding research projects that are required. In addition, the Census Bureau is conducting privacy

research to gauge public acceptance of administrative records use.

#### **MILESTONES**

April 1997	Conducted privacy group meetings on use of administrative records
March 16, 1998	Evaluate 1996 Community Census use of administrative records
September 1, 1998	Generate 1998 administrative record files
January 31, 1999	Evaluate 1998 administrative record files
March 25, 2000	Generate an administrative records national file
April 1, 2000	Generate administrative record site files (AREX 2000)
April 1, 2000	Begin implementation activities for Census 2000 experiments

### **XIII.G. 2010 CENSUS PLANNING**

#### **OBJECTIVE**

To carry out a long-range planning and design effort for the 2010 census.

#### **MAJOR FEATURES**

Demographic and social changes in the United States will make the year 2010 differ from 2000 even more than 2000 differed from 1990. For example, many of the baby boomers will be out of the work force, the continuing telecommunications revolution will have rounded the corner with a generation of children brought up with computers, several minority groups will have grown considerably as a proportion of the total population, and the World War II generation that relied on social security and medicare will be replaced by those who know they cannot rely entirely on such entitlements. The demographic changes and probable reduction of Federally-run programs will influence the data requirements and the manner in which the census can be taken in 2010. Therefore, as belts continue to tighten, and society and technology continue to change, early planning for the 2010 census may be even more important than it was for Census 2000.

The cornerstone of the 2010 planning effort is the identification of a range of possible designs for the next decade. This range provides the basis for determining the necessary experiments to conduct in Census 2000 (see section "Research and Experimentation Program"), which will provide data necessary for the full analysis of alternatives. Also crucial to the effort is the development of performance measures, such as cost, total quality, managerial feasibility, and total



benefits, which will allow the quantitative comparison of design alternatives.

Along with the determination of possible designs, experiments to study them, and measures to assess them, the 2010 program must include examinations of policy and legislative issues associated with each design, and the implications of census designs on public concerns about privacy and confidentiality.

Finally, because of the long lead time necessary to implement major technological changes, and the powerful impacts of technology on the feasibility of key census activities, an ongoing program of technological research is a necessary adjunct to other 2010 program activities.

Early planning for the 2010 census includes the following features:

- Identification of a continuum of potential designs to guide research efforts
- Implementation of key research contracts to inform tests for Census 2000
- Identification of key experiments, evaluations, and research for implementation in Census 2000
- Participation of staff actively involved in Census 2000 for full integration of concepts
- Early input from stakeholders

#### **MILESTONES**

October 1997	Identified continuum of potential designs for 2010
January 1998	Proposed experiments and research for implementation in Census 2000
October 1998	Begin external advisory process for 2010 census
October 1998	Begin implementation activities for Census 2000 experiments
September 2000	Begin documenting empirical evidence for proposed 2010 census designs
September 2001	Define post-Census 2000 experiments and research for 2010 census

United States  
CENSUS  
2000

**Section XIV.  
Puerto Rico**

**XIV. PUERTO RICO**

**OBJECTIVES**

Census 2000 operations in Puerto Rico will be comparable in scope to stateside activities. The Census Bureau is working in partnership with the government of Puerto Rico—as represented by the Puerto Rico Planning Board (PRPB)—on the program objectives to ensure that Census 2000 meets the legal requirements set forth in Title 13, U.S. Code, as well as the specific data needs of Puerto Rico.

**MAJOR FEATURES**

Census 2000 operations in Puerto Rico will be built around the same four fundamental strategies to be used stateside:

- *Strategy One: Build Partnerships at Every Stage of the Process*
  - The Census Bureau will develop and sign a Memorandum of Agreement with the government of Puerto Rico that will outline the mutual roles and responsibilities of each party in the conduct of Census 2000 on the Island.
  - In consultation with the PRPB and its local Interagency Committee, census questionnaire content will be developed that meets the legislative and program needs of Puerto Rico.
  - An advertising and promotion campaign designed to build awareness of the census and boost participation will be developed for Puerto Rico that will take into account its specific needs.



- The Census Bureau will conduct an address listing operation in Puerto Rico in 1998. This will allow for the full implementation of the Local Update of Census Addresses (LUCA) program (see page VI-5) and will serve as the basis for use of the update/leave method of data collection on the Island. During the update/leave operation, field enumerators update the address list and map and leave a census questionnaire at each housing unit for the residents to complete and mail back.
- *Strategy Two: Keep it Simple*
  - Using the findings from our census testing and research, the Census Bureau will design user-friendly questionnaires that are simpler and easier for respondents to understand and complete. Forms will be available in both Spanish and English.
  - Census questionnaires and other forms will be made more readily available to respondents and will be placed at Walk-In Questionnaire Assistance Centers and other convenient places where people frequent.
- *Strategy Three: Use Technology Intelligently*
  - Using the update/leave methodology for data collection for the first time in Puerto Rico will give respondents the opportunity to complete the census questionnaires themselves and return them by mail. This will allow the Census Bureau to make use of the same technological advances—that will be used stateside.

- The Census Bureau will make greater use of the telephone as a data collection tool, in addition to its use in providing assistance to respondents with questions about Census 2000.
- Data users will have access to Census 2000 data and products through the Internet, using the Data Access and Dissemination System (DADS) (see page XII-1). DADS will give users the flexibility to extract and tabulate census data quickly to meet their specific data needs.
- *Strategy Four: Use Statistical Methods*
  - The Census Bureau will use personal visits as well as the telephone to obtain response from households that do not return a census questionnaire.
  - On a daily basis, the Census Bureau will determine the response rate for every census tract, which is a neighborhood or area that has an average of about 4,000 people. The response rate is defined as:
$$\frac{\text{Mail} + \text{Telephone} + \text{Other Responses}}{\text{Questionnaires Mailed or Delivered}} \times 100\%$$
  - For any census tract in which this rate is less than 100 percent after the initial response period, enumerators will perform nonresponse followup (NRFU) (that is, contact the respondent and complete a census questionnaire).
  - The Census Bureau will select a sample of nonresponding addresses in each census tract

at the end of the initial response period. The sample will vary from census tract to census tract based upon the tract's response level and will be designed to achieve at least a 90-percent total response rate in each tract.

- Enumerators will perform NRFU for each of the selected sample addresses. The addresses will be visited by an enumerator who will complete a questionnaire by personal interview.
- A quality check (Integrated Coverage Measurement) survey will be conducted shortly after the regular enumeration to determine if people and housing units were missed or counted more than once. This survey is designed to eliminate the undercount experienced in the 1990 census and will result in a "one-number" census that accurately reflects the population of Puerto Rico.

#### MILESTONES

April 1997	Finalized Census 2000 plan for Puerto Rico
October 1997	Completed Phase 1 of Block Boundary Definition Program
February 1998	Finalize Memorandum of Agreement
August 1998	Begin address listing activities
December 1998	Complete questionnaire content determination process
April 1999	Conduct LUCA program
April 2001	Release total counts for Puerto Rico

March 31, 2001

Deliver P.L. 94-171 redistricting counts



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**Section XV.  
Island Areas**

**XV. ISLAND AREAS**

**American Samoa, Commonwealth of the Northern  
Mariana Islands, Guam, and U.S. Virgin Islands**

**OBJECTIVES**

Census 2000 operations in American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the U.S. Virgin Islands (collectively referred to as the Island Areas) will be conducted by the Census Bureau in partnership with the governments of each Island Area. These partnerships will work on the program objectives to ensure that Census 2000 meets the legal requirements set forth in Title 13, U.S. Code, as well as the specific data needs of each Island Area.

**MAJOR FEATURES**

Census 2000 operations in the Island Areas will be built around three of the four fundamental strategies to be used stateside (no sampling operations will be conducted in these Areas):

- *Strategy One: Build Partnerships at Every Stage of the Process*
  - The Census Bureau will develop and sign a Memorandum of Agreement with the Governor of each Island Area that will outline the mutual roles and responsibilities of each party in the conduct of Census 2000 for each Island Area.
  - In consultation with the local Interagency Committee established by each Island Area, the Census Bureau will develop the census questionnaire content that meets the legislative and programmatic needs of each Area.

- An advertising and promotion campaign designed to build awareness of the census and boost participation will be developed for each Island Area that will take into account its specific needs.
- The Census Bureau will conduct the data collection of the Island Areas using the list/enumerate method. This decision was based on recommendations from Island Area representatives and an analysis of the various data collection methodologies. During the list/enumerate operation, field enumerators list the housing units and show their spatial location on a map and enumerate the residents in one visit.
- **Strategy Two: *Keep it Simple***
  - Using the findings from our census testing and research, the Census Bureau will design respondent-friendly questionnaires and forms that are simpler and easier for the enumerators to administer and for the respondents to understand and answer. Forms will be available in English and in other languages widely spoken in the Island Areas.
  - Census questionnaires and forms will be made more readily available to respondents and will be placed in convenient places.
- **Strategy Three: *Use Technology Intelligently***
  - The Census Bureau will make greater use of the telephone as a data collection tool, in addition to its use in providing assistance to respondents with questions about Census 2000.

- Data users will have access to Census 2000 data and products using the Data Access and Dissemination System (DADS) (See page XII-1). DADS will give users the flexibility to extract and tabulate census data quickly to meet their specific data needs.

#### **MILESTONES**

February 1998	Finalize Census 2000 plan for each Island Area
March 1998	Complete questionnaire content determination process
August 1999	Finalize Memorandum of Agreement for each Island Area
March 31, 2001	Release total counts for each Island Area



United States  
CENSUS  
2000

## Appendixes

### APPENDIX A. GLOSSARY OF ABBREVIATIONS AND ACRONYMS

- ACF** (Address Control File) The residential address list used in the 1990 census to label questionnaires, control the mail response check-in operation, and determine the nonresponse followup workload.
- AIANA** (American Indian and Alaska Native Area) A Census Bureau term referring to these entity types: American Indian reservation, American Indian trust land, state designated American Indian statistical area, tribal jurisdictional statistical area, tribal designated statistical area, tribal subdivision, Alaska Native Regional Corporation, Alaska Native village, and Alaska Native village statistical area.
- ATM** (Asynchronous Transfer Mode) A process that increases the amount of information that can be electronically transferred at one time between sites.
- CAPI** (Computer Assisted Personal Interviewing) A method of data collection using a laptop computer in which the questions to be asked are displayed on the computer screen and responses are entered directly into the computer.
- CATI** (Computer Assisted Telephone Interviewing) A method of data collection using telephone interviews in which the questions to be asked are displayed on a

computer screen and responses are entered directly into the computer.

**CCD**

(Census County Division) A subdivision of a county that is a relatively permanent statistical area established cooperatively by the Census Bureau and local government authorities. Used for presenting decennial census statistics in those States that do not have well-defined and stable minor civil divisions that serve as local governments.

**CD-ROM**

(Compact Disk - Read Only Memory) An optical disk that is created by a mastering process and used for storing large amounts of data. Unlike standard computer disks and diskettes, CD-ROMs can be used only to read stored data, not to update or change its content.

**CFO**

(Census Field Office) One of approximately 402 temporary Census Bureau offices to be established in Census 2000 to manage address listing field work and conduct local recruiting.

**CV**(Coefficient of Variation) The ratio of the standard error (square root of the variance) to the value being estimated, usually expressed in terms of a percentage (also known as the relative standard deviation). The lower the CV, the higher the relative reliability of the estimate.

**DA**(Demographic Analysis) An independent, macro-level approach to validate the quality check estimates and the

"one-number" census results in Census 2000. Estimates using demographic analysis are derived by comparing aggregate sets of data or counts. Records used for demographic analysis include birth and death records, immigration statistics, and Medicare data.

**DADS**

(Data Access and Dissemination System) A generalized electronic system for all access and dissemination of Census Bureau data. This interactive electronic system will be designed to allow efficient and cost-effective access to data generated by the various areas of the Census Bureau. The DADS system will serve as the vehicle for accessing and disseminating data from Census 2000 and from the American Community Survey.

**DANC**

(Decennial Applicant Name Check) This automated system will be used to screen all applicants' backgrounds for criminal histories to facilitate the selection, hiring, promotion, and payrolling of qualified and suitable applicants for the conduct of Census 2000.

**DCC**

(Data Capture Center) One of four decentralized Census Bureau facilities (one permanent, three temporary) that will check in Census 2000 questionnaires returned by mail, create images of all questionnaire pages, and convert data to computer readable format using OMR, ICR, and data keying technologies. The DCCs also will perform other computer proc-



essing activities, including automated questionnaire edits, work flow management, and data storage. Called "processing office" (PO) in previous censuses.

**DCS 2000**

(Data Capture System 2000) The data capture system that will be used to capture information from census forms. This system will incorporate the following activities: processing more than 120 million incoming forms; digitally capturing and processing billions of bits of information on the forms; converting automatically the image of the form to text-based data; and editing/repairing data that the system is unable to decipher automatically.

**DFI**

(Decennial Field Interface) The collection of systems that will be used in census field offices to control and manage the census data collection effort. It includes, among others, the operations control, payroll and personnel, map production, and management information systems.

**DSF**

(Delivery Sequence File) A computerized file containing all delivery point addresses serviced by the USPS. The USPS updates the DSF continuously as its letter carriers identify addresses for new delivery points or changes in the status of existing addresses.

**GQ**

(Group Quarters) A place where people live that is not the typical household-type living arrangement. The Census Bureau classifies all persons not living in house-

holds as living in group quarters. There are two types of group quarters: institutional (for example, correctional facilities, nursing homes, and mental hospitals) and noninstitutional (for example, college dormitories, military bases and ships, hotels, motels, rooming houses, group homes, missions, shelters, and flophouses).

**HH**

(Hawaiian Homelands) Areas created as a result of the Hawaiian Homes Commission Act of 1920 to provide agricultural, pastoral and residential land for native Hawaiians.

**HU(Housing Unit)** A house, an apartment, a mobile home, a group of rooms, or a single room that has its own kitchen facilities, a separate entrance, and is occupied as a separate living quarters or, if vacant, intended for occupancy as a separate living quarters.

**ICM**

(Integrated Coverage Measurement) A coverage measurement methodology, also known as the Quality Check Survey, that will be used to determine the number of people and housing units missed or counted more than once in Census 2000. This information is combined with the enumeration results before producing a single set of official census results (the one-number census estimates).

**ICR**

(Intelligent Character Recognition) Technology that uses an optical scanner and computer software to "read" human

handwriting. Sometimes referred to as "optical character recognition" (OCR).

- LCO** (Local Census Office) One of approximately 520 temporary Census Bureau offices to be established for Census 2000 data collection purposes. Called "district office" (DO) in previous censuses.
- L/E** (List/enumerate) A method of data collection in which enumerators list each residential address and enumerate the household in one visit.
- LHFU** (Large Household Follow-up) A census operation that follows up on households that indicated on their census form that there are six or more persons in that housing unit.
- LUCA** (Local Update of Census Addresses) A Census 2000 program, established in response to requirements of P.L. 103-430, that provides an opportunity for local and tribal governments to review and update individual address information in the MAF and associated geographic information in the TIGER data base to improve the completeness and accuracy of both computer files.
- MAF** (Master Address File) A computer file based on a combination of the addresses in the 1990 ACF and current versions of the DSF, supplemented by address information provided by state, local, and tribal governments. The MAF is being updated throughout the decade to provide a basis

- for producing address labels needed to deliver Census 2000 questionnaires, keep track of which forms have been returned and which need followup, serve as the sampling frame for the Census Bureau's periodic demographic surveys, and support other Census Bureau statistical programs.
- MCD** (Minor Civil Division) A primary and/or administrative subdivision of a county, such as a township, precinct, or magisterial district.
- MO/MB** (Mailout/mailback) A method of data collection in which the USPS delivers addressed questionnaires to residents who are asked to complete and mail back the questionnaire to the appropriate Census Bureau office.
- NRFU** (Nonresponse Followup) A census follow-up operation in which temporary field staff, known as enumerators, visit addresses from which no questionnaire was returned by mail, from which a telephone response was not received, or for which no administrative records could be located.
- OCR** (Optical Character Recognition) Machine identification of printed characters through the use of light sensing devices.
- OMR** (Optical Mark Recognition) Technology that uses an optical scanner and computer software to scan a page, recognize the presence of marks in predesignated areas,



and assign a value to the mark depending on its specific location on a page.

**PAMS/  
ADAMS**

(Preappointment Management System/Automated Decennial Administrative Management System) An integrated structure of administrative management programs that supports applicant tracking and processing, background checks, selection records, recruiting reports, personnel and payroll processing, and archiving of historical data.

**P.L.  
94-171**

(Public Law 94-171) The public law that requires the Census Bureau to provide selected decennial census data tabulations to the states by April 1 of the year following the census enumeration. These tabulations are used by the states to redefine the areas included in each Congressional district and in other districts used for state and local elections, a process called redistricting.

**P.L.  
103-430**

(Public Law 103-430) The public law that amends Title 13, United States Code, to allow designated local and tribal officials access to the address information in the MAF to verify its accuracy and completeness. This law also requires the USPS to provide address information it compiles to the Census Bureau to improve the MAF.

**PUMS**

(Public Use Microdata Sample) Computerized files containing a small sample of individual long-form census records show-

ing the population and housing characteristics of the people included on those forms.

**QA**

(Quality Assurance) A systematic approach to build quality into a process.

**QC**

(Quality Check) A coverage measurement methodology (also called the Integrated Coverage Measurement Survey) that will be used to determine the number of people and housing units missed or counted more than once in Census 2000. This information is combined with the enumeration results before producing a single set of official census results (the one-number census estimates).

**RCC**

(Regional Census Center) One of 12 temporary Census Bureau offices established to manage LCO activities and to conduct geographic programs and support operations such as automated map production. The Census Bureau also will open an "Area Office" to manage census operations in Puerto Rico.

**RO**(Regional Office) One of 12 permanent Census Bureau offices established in 12 cities throughout the country to implement outreach and promotion activities during the census period and to conduct survey enumeration and other decentralized work of the Census Bureau.

**SBE**

(Service-based Enumeration) An operation designed to enumerate people at places where they might receive services,

such as shelters, soup kitchens, and other selected locations. This operation targets the types of services that primarily serve people who have no usual residence.

**SP**

(Special Place) A residence where people live or stay other than the usual house, apartment, or mobile home. Examples are colleges and universities, boarding and rooming houses, marinas, nursing homes, hospitals, and prisons.

**STF**

(Summary Tape File) A series of census summary tabulations of complete count and sample population and housing data available for public use on computer tape and CD-ROM.

**TIGER®\***

(Topologically Integrated Geographic Encoding and Referencing) A computer data base that contains a digital representation of all census-required map features (streets, roads, rivers, railroads, lakes, and so forth), the related attributes for each, and the geographic identification codes for all entities used by the Census Bureau to tabulate data for the United States, Puerto Rico, and Island Areas. The TIGER data base records the interrelationships among these features, attributes, and geographic codes and provides a resource for the production of maps, entity headers for tabulations, and automated assignment of addresses to a geographic location in a process known as "geocoding."

**T-NIGHT**

(Transient Night) An enumeration procedure conducted to enumerate people occupying campgrounds at racetracks, recreational vehicle (RV) campgrounds or RV parks, commercial or public campgrounds, fairs and carnivals, and marinas.

**TQA**

(Telephone Questionnaire Assistance) A toll-free service that will be provided by a commercial phone center to answer questions about Census 2000 or the census questionnaire.

**U/L**

(Update/leave) A method of data collection in which enumerators personally deliver a census questionnaire to a household to be completed and returned by mail



and at the same time update the address list.

**USPS**

(United States Postal Service) The organization responsible for delivering the mail questionnaires in Census 2000, and the producer of the DSF.

**WAN**

(Wide Area Network) A group of computers linked within a network, such as the Census Bureau's regional offices, to exchange and share information. Whereas a "local area network" may link computers within a building or among several buildings, a WAN covers more area and distance.

\*TIGER® is a registered trademark of the U.S. Bureau of the Census. For ease of presentation, the trademark symbols for TIGER and TIGER-related products are omitted from the text.

## APPENDIX B. KEY CENSUS BUREAU TELEPHONE CONTACTS

### Headquarters

<u>Program Area</u>	<u>Contact Person</u>	<u>Telephone Number</u>
Marketing Partnerships	Solomona Aoelua	301-457-2988
Content	Brenda August	301-457-1646
Determination Forms, Printing and Mailing	Louisa Miller	301-457-2073
Address List	James Marsden	301-457-4010
Development	Linda Franz	301-457-1014
Geographic Services	Robert LaMacchia	301-457-1022
Office		
Infrastructure	Mark Taylor	301-457-1827
Automated Collection	Howard Prouse	301-457-1933
Personal Visit	Charles Moore	301-457-2051
Special Populations	Annetta Clark-Smith	301-457-2378
Telephone Questionnaire Assistance/Internet	Barbara LoPresti	301-457-2839
Data Capture	Alan Berlinger	301-457-1737
Data Processing	Maureen Lynch	301-457-4092
Statistical Design	Howard Hogan	301-457-4242
Quality Check Operations	David Whitford	301-457-4035

<i>Dissemination and Products Evaluation</i>	<i>Jane Ingold Florence Abramson</i>	301-457-4646 301-457-4222
<i>Research/ Experimentation 2010 Census Planning Puerto Rico/ Island Areas</i>	<i>Deborah Bolton Jay Keller Lourdes Flaim</i>	301-457-3944 301-457-4040 301-457-4041
<b>General</b>		
<i>Customer Service .....</i>		301-457-4100
<i>Census Locator .....</i>		301-457-1713
<i>Census Bureau Website .....</i>	<i>www.census.gov/</i>	

### ***Census Bureau Regional Offices***

#### **(Information Services, Data Product Information)**

Atlanta, GA .....	404-730-3833/3964 (TDD)
Boston, MA.....	671-424-0510/0566 (TDD)
Charlotte, NC .....	704-344-6144/6548 (TDD)
Chicago, IL .....	708-562-1740/1791 (TDD)
Dallas, TX .....	214-640-4470/4434 (TDD)
Denver, CO .....	303-969-7750/6769 (TDD)
Detroit, MI .....	313-259-1875/5169 (TDD)
Kansas City, KS .....	913-551-6711/5839 (TDD)
Los Angeles, CA .....	818-904-6339/6249 (TDD)
New York, NY .....	212-264-4730/3863 (TDD)
Philadelphia, PA .....	215-597-9313/8864 (TDD)
Seattle, WA .....	206-728-5314/531 (TDD)
Regional Office Liaison at Head- quarters .....	301-457-2032



**APPENDIX C. ADDITIONAL INFORMATION  
CONCERNING THE CENSUS 2000  
DRESS REHEARSAL**

1. Contrasts Between the Three Dress Rehearsal Sites
2. Census 2000 Decision Memorandum No. 36, "Key Features of the Census 2000 Dress Rehearsal with Aspects of a Nonsampling Methodology in the South Carolina Site."

April 1998

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**CASE No. 1:98CV00456-RCL**

**UNITED STATES HOUSE OF  
REPRESENTATIVES, PLAINTIFF**

**v.**

**THE UNITED STATES DEPARTMENT OF  
COMMERCE, ET AL. DEFENDANTS AND  
CITY OF LOS ANGELES, ET AL.,  
PROPOSED INTERVENOR-DEFENDANTS**

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**THREE JUDGE COURT**

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**DECLARATION OF MARGO J. ANDERSON**

Margo Anderson declares:

1. I am a Professor of History and Urban Studies at the University of Wisconsin-Milwaukee, where I have taught since 1977. I was the Chair of the History Department from 1992-95. I graduated *summa cum laude* with a B.A. in History from Bucknell University in 1967, and received my M.A. and Ph.D in History from Rutgers University in 1972 and 1978, respectively.

2. My primary fields of scholarship are the social history of the United States Census and the history of statistics. I am the author of *The American Census: A Social History* (New Haven: Yale University Press, 1988) and the co-author with Stephen Fienberg of the forthcoming *Who Counts? The Politics of Census Controversies* (New York, Russell Sage). I have published over twenty major articles on these and related topics.

3. I am currently the Chair of the Social Statistics Section of the American Statistical Association. I was a member of the Panel on Census Requirements in the Year 2000 and Beyond, Committee on National Statistics. The Report of the Panel was published as *Modernizing the U.S. Census* (Barry Edmonston and Charles Schultze, eds. (National Academy Press, 1995).

4. Plaintiffs incorrectly suggest that the Census Bureau's plan to use statistical sampling represents an unprecedented departure from an established practice of taking the census. See, e.g., Plaintiffs' Statement of Undisputed Material Facts No. 4, Memorandum for Plaintiff U.S. House of Representatives In Support of its Motion for Summary Judgment, 1 ("Memo."). Plaintiffs' memorandum shows a basic lack of

understanding of the history of censustaking. See, e.g., Memo. at 1. Rather the history shows that over the past 200 years, census taking methods have changed as advancements in technology and statistical science have evolved. All of the innovations in methods of censustaking for the past 200 years have aimed at a more accurate count. The goal with each change in method was to improve the accuracy and efficiency of the census.

5. The decision to use limited sampling to adjust for the undercount in Census 2000 is a natural progression in a process that has been going on for as long as the United States has been conducting the census. Problems with accuracy are identified and studied, and changes are implemented to address those problems and improve accuracy. The Framers could not have intended to prohibit statistical sampling because statistical sampling was unknown at the time. Likewise just as the Framers did not anticipate rail, auto, or air travel, or electrical forms of power, they did not anticipate such innovations as the mail census and TIGER (Topologically Integrated Geographic Encoding and Referencing System), machine tabulation, or computerization in census-taking. Nor did "statistical sampling" as a probability method exist in the 18th century. Thomas Jefferson's "estimate" was not a probability estimate, because probability estimates were themselves inventions of the 19th and 20th century. Jefferson's estimates were based upon common sense methods of extrapolation or interpolation, which might have been very good, but they were not numbers arrived at through probability sampling.



6. The history of censustaking in the United States can be conceptualized in four major periods. From the first to the sixth censuses (1790-1840), the State Department oversaw a household level enumeration taken by assistants to the United States marshals. The results were tallied in the field, and compiled into national results by a clerical staff in Washington of about a dozen people. From 1850 to 1900, Congress mandated a temporary Census Office in the Interior Department that oversaw the tabulation of an individual level census. The volume of data collected, tabulated, and reported expanded dramatically, as the decennial census became one of the federal government's largest undertakings. Federal officials introduced machine tabulation of the data in 1890. After the turn of the century, the census professionalized and entered its third phase. In 1902, Congress created a permanent Census Bureau in the Department of Commerce and Labor (later the Commerce Department), and the Census Bureau began to take on additional responsibility for periodic surveys and statistical functions beyond the decennial count. In the fourth phase, since 1940, the Census Bureau integrated emerging statistical theory, probability methods and computerization into a variety of survey operations, including the decennial census, which now characterize modern statistical practice.

7. Contrary to plaintiffs' assertions, from the first census of 1790 to the present, particularly in the early years, the census was never a "physical headcount" of each individual person. Nor was an "actual inquiry at every dwelling house" the sole instruction given to assistant marshals or enumerators. See Memo. at 8, 10. Rather the assistant marshal or enumerator was told to

get the best information about the household from the household head of the family. He was supposed to contact the household head or reference person to gather the data on the whole family. The ideal method was a visit to each dwelling house, but Congress always acknowledged in statutory language that such a visit might be impossible. Thus the language of the 1810 Census Act, for example, gave the assistant marshals some leeway: The enumerator was to make "an actual inquiry at every dwelling house, or of the head of every family within his district." In other words, the assistant had the authority to get the information without a visit to the dwelling.

8. Congress undertook a major overhaul of the census law for the 1850 census. Although plaintiffs would have the court believe otherwise, the census did not attempt to identify each individual by name and personal characteristics until then. Prior to 1850, only the name of the household head was written down on the form; everyone else in the household was numbered. Beginning with the 1850 census, the unit of analysis was no longer the household, but the individual. Margo J. Anderson, *The American Census: A Social History* 39, 40 (1988). A group of scholars and statisticians recognized that a change in existing procedures was needed because the results of the 1840 census revealed substantial error. They attributed the inaccuracy to the unwieldy 80-column schedule and decentralized tabulation procedures that were used in the 1840 census. See *id.* at 29-37. For the previous three decades Congress had been expanding the demands for information they made on the census. The errors they discovered in the 1840 count revealed that they could not collect such information accurately with

the census machinery they had at the time. Hence, they affirmed their commitment to collecting more accurate and detailed information about the population by dramatically increasing the census bureaucratic structure, moving to an individual level count, and committing themselves to publish many volumes of census results.

9. Concerns about the accuracy of the census and census methodologies are a constant refrain in the history of the census. For example, Francis Walker, who was the Census Director for the 1870 and 1880 censuses, wrote in the 1890s about the 1890 census: "No matter how well the work in general may have been done, bad spots can always be detected, here and there, by searching scrutiny. . . . There are rural communities in which it would be inexcusable for a census-taker to omit a single person among five hundred or a thousand. There are other communities in which it would no more be possible for a census-taker to secure the name of every resident than it would be for an accomplished angler to catch the last trout in a stream." 2 Francis A. Walker, *Discussions in Economics and Statistics* 115 (Davis Dewey, ed. 1970). Walker himself made major efforts in increasing census accuracy, including shortening the enumeration period from months to two weeks in cities and populous areas, setting up a Geography Division in the Census Office to systematically map the country, and developing examinations for hiring census enumerators. But he could not do more than make educated guesses about how much error existed in the count, because probability models did not exist at the time.

10. The Census Bureau became a permanent federal agency in 1902, located in the new Department of Commerce and Labor. Congress recognized that taking the census required special expertise. The 1900 Census law authorized the appointment of an Assistant Director, "who shall be an experienced practical statistician," and five chief statisticians, "who shall be persons of known and tried experience in statistical work." Margo J. Anderson & Stephen E. Fienberg, *Who Counts? The Politics of Census Taking in Contemporary America* 16 (forthcoming). As the field of statistics grew, and the professional statistical community expanded, natural links developed between professional statisticians and the Bureau. An Advisory Committee to the Census Bureau was formed in 1919. Advising the Bureau on policy, questionnaire design, and other aspects of statistical innovation, the Advisory Committee became a tangible link between the Census Bureau and the growing professional statistical community. This trend toward statistical innovation at the Bureau was reflected in the major changes of the 1940 Census.

11. By the 1930s, statistical sampling techniques had begun to be perfected and applied to problems of censustaking. Jerzy Neyman's famous 1938 article, "Contributions to the Theory of Sampling Human Populations," (Anderson at 185), for example, informed the 1940 census design and led to major changes in the 1940 census. The 1940 census included additional questions on a sample of the population for the first time, a housing census and evaluation studies to systematically measure the level of accuracy of the enumeration, the tabulation and coding procedures,



coding bias and sampling error. Anderson & Fienberg at 21.

12. It was part of the general trend in statistical innovation at the Bureau that statisticians began their systematic estimates of census undercount. The undercount was first identified in 1940, and in the 1950s demographers and the Census Bureau began to use a technique called "demographic analysis" to ascertain the extent of the undercount. This technique involved comparing information from earlier censuses and other population data with the aggregate population counts for particular cohorts of the population. Anderson & Fienberg at 23. Demographic analysis, however, had its limits. As an aggregate methodology, it cannot pinpoint exactly why the undercount (or overcount) exists; it cannot provide more specific information about the sources of the undercount. In order to overcome this limitation of demographic analysis, the Census Bureau developed new techniques, particularly the post enumeration survey (PES), which was first used after the 1950 census in an effort to identify inaccuracies in the original count. *Id.* By the 1960s, there was a growing body of knowledge about the census undercounts. Professional statisticians and experts at the Census Bureau began to discuss the best methods for estimating the undercount, and for improving the accuracy of the count in the first place. In 1969, the National Academy of Sciences created the "Advisory Committee on Problems of Census Enumeration" to assist the Bureau in, among other things, researching and recommending methods to reduce or eliminate the undercount. *Id.* at 30.

13. The 1950s and 60s saw more technical improvements in censustaking. The professional standards of the Census Bureau improved greatly as it hired and developed a new generation of sampling statisticians, survey researchers, and technicians. Anderson & Fienberg at 27. In 1950, the Census Bureau first used a computer to tabulate results, making it a pioneer in the government in the use of data processing. Anderson at 197. In 1960, the Bureau used "Film Optical Sensing Device for Input to Computers"—a scanner—to read answers on the census form electronically. A major change in census methodology occurred in 1970 with the first mail census. The Bureau decided to use a mail census for about 60% of the country—mainly urban areas—in order to improve overall coverage of the population. Anderson at 211.

14. By the early 1970s, Bureau officials knew a great deal about the differential undercount. But they did not know whether it would be possible to correct for it, because demographic analysis, the best method for measuring undercount at that point, did not permit estimation of undercount at low levels of geography. For much of the 1970s and 1980s, census officials, two National Academy panels and professional statisticians worked on this problem. In 1987, Bureau statisticians announced that they had solved the problem of measuring the undercount at the local level and proposed the use of a 300,000 household PES as part of the 1990 census design. There was still a good deal of controversy about the new methodology, to the point that in October 1987 Commerce officials overruled the Bureau and cancelled the expanded PES. In late 1988, New York City and a coalition of states and local communities sued for the reintroduction of the PES. In

July 1989, the parties entered into a stipulation agreement to conduct a 150,000 household PES and consider de novo its use for adjusting the April 1990 count.

15. Hence, claims by Bureau officials that there was no statistically defensible method of adjustment in 1980 are true, but plaintiffs's use of such claims is unavailing and irrelevant, since the government conceded in 1989 that there could be an adjusted 1990 count if the PES was successful. *See* Memo. at 14.

16. The House's Memorandum is replete with other inaccuracies. The following list is just a sample:

a. Plaintiffs contend that "[Thomas] Jefferson was familiar with methods of statistical estimation, having used them effectively in his 1782 survey of Virginia's population." Memo. at 12. However, "methods of statistical estimation" did not exist in the 18th century. The 18th century "estimate" was not a probability estimate; probability estimates were not invented until the late 19th century. An "estimate" for Jefferson was a "guess"—which could be a good one, but it did not mean a number arrived at through probability sampling.

b. Similarly, plaintiffs mischaracterize history when they contend that "The Framers understood that the population could be determined through either statistical estimation or a headcount because the colonies had used both procedures in the past." Memo. at 27. Again, since statistical estimation did not exist in the 18th century, the colonies could not have used this procedure; thus the Framers could not

have been making the choice that plaintiffs argue they made.

c. Plaintiffs contend that "a number of well-known experts have disagreed sharply" with the National Academy of Sciences' conclusion that "statistical sampling would increase the accuracy and lower the costs of the census." Memo. at 16. They cite, by way of example, articles by David Freedman and Kenneth Wachter. But these experts are not in fact representative of professional opinion, which is best expressed by the organizational resolutions of the professional associations. For example, the American Statistical Association, which has more than 19,000 members nationwide, has endorsed the use of sampling in Census 2000. The American Sociological Association, a professional group of more than 12,500 sociologists, research scientists, and others interested in sociology, unanimously approved a resolution supporting the use of sampling in Census 2000.

17. In sum, the historical record tells a very different story from that told by plaintiffs. It reveals 200 years of efforts—and highly successful ones at that—to increase the accuracy and efficiency of the decennial count. Much of the impetus for the organizational and statistical innovation came from dissatisfaction with the quality of the results of the previous census. Thus, the dissatisfaction with the 1840 count led to the expansion and reform of censustaking in 1850. The dissatisfaction with the capacity of a temporary agency to further professionalize and improve the quality and accuracy of the count led in the late nineteenth century to pressure for the permanent



Census Bureau. The demands for data for the expanded functions of the federal government in the early twentieth century led the Bureau to introduce probability methods to improve the quality, quantity, and timeliness of its statistical results. The goal of all of these innovations is precisely so that the apportionment of Congress "according to their respective Numbers" can be based upon numbers that Americans can count on.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 2 day of May, 1998.

/s/ MARGO J. ANDERSON  
MARGO J. ANDERSON

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

—  
CASE No. 1:98CV00456-RCL

UNITED STATES HOUSE OF  
REPRESENTATIVES, PLAINTIFF

v.

THE UNITED STATES DEPARTMENT OF  
COMMERCE, ET AL. DEFENDANTS AND  
CITY OF LOS ANGELES, ET AL.,  
PROPOSED INTERVENOR-DEFENDANTS

—  
THREE JUDGE COURT  
—

DECLARATION OF STEPHEN ELLIOTT  
FIENBERG

I, Stephen Elliott Fienberg declare:

### Qualifications

1. I am a Maurice Falk University Professor of Statistics and Social Science at Carnegie Mellon University, a position I have held since 1997. I was also Head of the Department of Statistics from 1981-1984, Dean of the College of Humanities and Social Sciences from 1987-1991, and Maurice Falk Professor of Statistics and Social Science from 1985-1991 and 1992-1997. At York University in North York, Ontario, Canada, I was Professor of Statistics and Law from 1991-1993 and Vice President of Academic Affairs from 1991-1993. I previously held several positions at the University of Minnesota's Department of Applied Statistics, School of Statistics, including Acting Director for the Statistical Center, Chairman of the Department of Applied Statistics, and Professor.

2. I am a Fellow of several professional societies, including the American Association for the Advancement of Science, the American Statistical Association, the Institute of Mathematical Statistics, and the Royal Statistical Society. I have served as Vice President of the American Statistical Association, President of the International Society for Bayesian Analysis and am currently President-Elect of the Institute of Mathematical Statistics. I have also held numerous professional and government-related consulting positions in statistics, including such a consulting position with the U.S. Bureau of the Census ("Bureau") from 1979-1980 and 1982-83.

3. I have written extensively on the subject of statistical methods and their application. I have authored 14 books and over 200 papers on this subject.

My major works addressing statistical sampling and adjustment methodologies in the context of the census include:

- *Who Counts? The Politics of Census Taking in Contemporary America* (New York, Russell Sage), forthcoming, which I co-authored with Margo Anderson of the University of Wisconsin-Milwaukee;
- *Who Counts: The Politics of Censustaking*. Society (Transaction), 34, (No. 3 March/ April 1997), 19-26 (with M. Anderson);
- *Bibliography on capture-recapture modelling with application to census undercount adjustment*. Survey Methodology 18 (1992), Vol 15, 779-821;
- *The New York City census adjustment trial: Witness for the plaintiffs*. Jurimetrics, 34 (Fall 1993), 65-83;
- *Ethical and modelling considerations in correcting the results of the 1990 decennial census*. Ethics in Modeling (W.A. Wallace, ed.), (1994), Pergamon, 103-144;
- *Multiple sample estimation of population and census undercount in the presence of matching errors (with discussion)* Proceeding of the Bureau of the Census Tenth Annual Research Conference (1994) (with Ye Ding). A revised version appeared in Survey Methodology, 22, (1996), 55-64;
- *An adjusted census in 1990* (in nine parts),



- (a) *An adjusted census in 1990*, Chance, 2 (No. 3), (1989), 23-25 (with M. Anderson);
  - (b) *An interim report*, Chance, 3 (No. 1), (1990) 19-21;
  - (c) *Back to court again*, Chance, 3 (No. 2), (1990) 32-35;
  - (d) *The judge rules and the PES begins*, Chance, 3 (No. 3), (1990) 33-36;
  - (e) *Commerce says no*, Chance, 4 (No. 3) (1991), 44-52;
  - (f) *A full scale judicial review approaches*, Chance, 4 (No. 4) (1991) 22-24, 29;
  - (g) *The trial*, Chance, 5 (No. 3-4), (1992) 28-38;
  - (h) *Trial and judgment set aside*, Chance, 7, (1994), 31-32;
  - (i) *The Supreme Court decides*, Chance, 9, (No. 2) (1996), 4-9 (with M. Anderson);
- *A three-sample multiple-recapture approach to census population estimation with heterogeneous catchability*. J. Amer. Statist. Assoc., 88 (1993), 1173-1148 (with J.N. Darroch, G.F.V. Glonek and B. Junker).
4. In 1992, at the trial of *City of New York v. Department of Commerce*, an earlier case concerning the use of statistical methodologies in the 1990 Census, I testified on behalf of the State of New York concerning the: (1) history of dual system estimation (discussed below), (2) the use of the dual system estimation

method by the Bureau in the context of the decennial census from 1950 through 1980, (3) my work on the Committee on National Statistics at the National Academy of Science on decennial census methodology, and (4) the errors, biases and misrepresentations used to support the Secretary of Commerce's decision not to adjust the 1990 Census total for undercount.

5. My opinions expressed herein are based upon my professional knowledge and experience, my review of relevant scientific literature, my review of the Bureau's reports concerning the censuses for 1980, 1990 and 2000, and my review of various pleadings on file in this action and in other similar litigation.

#### Challenges to the 2000 Census

6. The daunting task of attempting to count each and every one of the more than 250 million Americans can be illustrated by a much simpler task—trying to count the number of persons at a local high school basketball game during halftime. During halftime, spectators come and go—some leave, some get refreshments, some switch seats, and the players and coaches go to the locker rooms. Some spectators may be counted twice (those who change seats), and even more might be missed (those who were not in their seats when that area of the gym was being counted). Now, consider attempting this task for the dynamic, shifting, ever mobile population of the entire United States. It should not be surprising to learn that planning for the decennial census often begins at least a decade prior to the enumeration, costs billions of dollars, and even then is subject to substantial error.

7. In conducting every census, the Bureau must contend with numerous sources of error, including, but

not limited to: (1) missed households, (2) persons who refuse to participate, (3) conflicting definitions of "housing units" and "families," (4) different dates of enumeration for different phases of census operations, (5) the completion of the census questionnaire by one person who provides erroneous information for the entire household, (6) confusion about the questionnaire's instructions and wording, (7) persons inadvertently checking the wrong box on the questionnaire form, (8) the failure of enumerators to complete the questionnaire or recording information different than that given by those in the household, (9) the submission of multiple questionnaires by a single household, (10) coding and processing errors, (11) fabrication, (12) enumerators obtaining information from mailmen, neighbors or building managers as "a last resort" before turning in their questionnaires, and (13) difficulty counting special groups (for example, parolees and probationers).

8. A little more than fifty years ago, the Bureau realized the presence of a particularly disturbing problem which is a complex combination of many of these sources of error, called "differential net undercounting." Simply put, the members of different subpopulations are missed at different rates. As detailed by Daniel O. Price in his article on the subject, the draft in World War II demonstrated that the 1940 Census underreported about 3% of men between the ages of 21 and 35. Daniel O. Price. *A Check on Underenumeration in the 1940 Census* (American Sociological Review, 12:44-49, Feb. 1947). Price also found that the degree of the undercount varied by region and race. He demonstrated that approximately 13% of the black men of draft age were missed in the census. The following

table shows the estimated net census undercount rates from 1940 to 1990 as measured by demographic analysis, a method I describe in more detail below:

Year	Black	White	Difference	Overall Undercount
1940	10.3%	5.1%	5.2%	5.6%
1950	9.6%	3.8%	5.8%	4.4%
1960	8.3%	2.7%	5.6%	3.3%
1970	8.0%	2.2%	5.8%	2.9%
1980	5.9%	0.7%	5.2%	1.4%
*1990	7.4%	1.0%	6.4%	1.9%

\* Preliminary Calculation using same methodology as in 1980.



## 1990 Revised Estimates\*\*

1940	8.4%	5.0%	3.4%	5.4%
1950	7.5%	3.8%	3.8%	4.1%
1960	6.6%	2.7%	3.9%	3.1%
1970	6.5%	2.2%	4.3%	2.7%
1980	4.5%	0.8%	3.7%	1.2%
1990	5.7%	1.3%	4.4%	1.8%

Robert E. Fay et al. *The Coverage of the Population in the 1980 Census*, Bureau of the Census. (U.S. Department of Commerce, Washington, D.C. 1988); U.S. Bureau of the Census. *Statistical Abstract of the United States, 1996*. (Government Printing Office, Washington, D.C. 1996). What is especially disconcerting about these data is that the differential net undercount in the 1990 Census was greater than that in the 1980 Census, despite the Bureau's redoubled efforts to enumerate the entire population using a host of special coverage completion methods.

9. Extensive research conducted near the census-taking period in 1990 suggested some of the characteristics of those persons who were undercounted, including:

- persons residing in complex housing arrangements (e.g., containing more than one family);

\*\* Revised to reflect 1990 change in methodology in the classification of mixed race births. (Source: [FPRC88] and [otC91])

- people residing in informal housing arrangements (e.g., rented attics, basements, garages, trailers and illegal units);
- obile persons; and
- persons fearing the government and census takers.

### Overview of the 2000 Census

10. The 2000 Census will consist of three phases, including: (1) a basic mail out/mail back enumeration process combined with a series of special enumeration approaches for different segments of the population—this is an attempt at a complete enumeration, (2) a non-response follow-up ("NRFU") of those households which did not return their questionnaires after repeated mailings, visits or calls, and (3) an integrated coverage measurement ("ICM") technique for correcting the data from the first two phases.

11. The 2000 Census mailing campaign has a number of new features representing an improvement over prior censuses. Unlike the 1990 Census, the 2000 Census will utilize a recently developed master address file ("MAF"), which is a combination of the 1990 Census address list and the current national Postal Service list. Prior to the enumeration, census takers will canvass every block to double check the accuracy of the addresses. The 2000 Census also uses a new marketing strategy to boost the return rate. In contrast to the single questionnaire used in the 1990 Census, the 2000 Census will use multiple mailings; it will have two mail contacts with questionnaires, each of which will be preceded with a reminder. In addition to the mailings

the questionnaires will also be delivered and picked up by hand. There will be special methods employed for non-traditional households. In addition to the mail out/mail back component, other mechanisms will be available for the distribution of and completion of the census questionnaire, and those alternatives will be widely publicized. Questionnaires in different languages will be made available in public places, such as libraries and post offices. Bureau of the Census. *Report to Congress-The Plan for Census 2000*. (Government Printing Office: August 1998).

### **Statistical Methodologies and the 2000 Census**

#### **(1) The NRFU**

12. The Achilles' heel of the 1990 Census was the Bureau's effort to send out enumerators to get responses from every household that did not respond to initial attempts to reach them. Special programs designed to reach all of those who were missed produced data of questionable quality. The further from the April 1 Census Day that data was collected, the more data quality declined and errors increased. Eugene P. Erickson and Theresa K. DeFonso. *Beyond the Net Undercount: How to Measure Census Error*. Chance, 6(4): 38-43, 1993. This process was also difficult, time-consuming, and expensive.

13. The 2000 Census enumeration component will rely mainly on mail return of census questionnaires, as has every census since 1970. The mail response rate, however, has fallen from 78% in 1970 to 65% in 1990. As a result, the Bureau hired and trained more than 500,000 interviewers to go door-to-door. For the 2000 Census, the Bureau expects the return rate to decline even further to 55%, but believes that it can raise the

response rate to 67% by using a second mailing. Despite the effort that is planned the enumeration process is expected to leave 34 million occupied households that do not respond. Bureau of the Census. *Report to Congress-The Plan for Census 2000*. (Government Printing Office: August 1998).

14. To illustrate how the NRFU works, let us consider a hypothetical census tract of 15 blocks with approximately 4,000 people in 1,500 housing units. Conventional enumeration methods (i.e., the mail campaign telephone calls, etc.) might result in 1,005 (or 67%) responding households. Under the proposed NRFU, the Bureau will ensure direct contact with *at least* 90% of the units in each tract. The Bureau would then randomly select 345 of the 495 non-responding units for visits and interviews. Responses for the 150 (10%) remaining housing units would be estimated using sample interview data from the sample of 345 housing units. *Report to Congress-The Plan for Census 2000*. (Government Printing Office: August 1998).

15. The 2000 Census NRFU is designed to rectify the inaccuracies, wasted time, and sky rocketing costs produced by the 1990 Census follow-up by circumventing the costly, unproductive, and statistically questionable census completion programs. By contacting a sample of the non-responding households, the Bureau will save significant money, which can be used to hire better enumerators who will obtain more reliable data, resulting in greater accuracy in the total enumeration. Thus, NRFU will also reduce the time span over which the follow-up is conducted, reducing errors caused by a dynamic U.S. population.



## (2) The ICM

### (a) Explanation of Dual System Estimation (DSE) Methodology

16. Inaccuracy in the census largely stems from 4 problems, two of these relate to omissions and two to erroneous enumerations. First, some housing units are never counted because they are missing from the MAF or inaccurate information leads them to be classified as unoccupied. Improvements in the quality of the MAF will reduce the number of missed housing units. A second and much equally large source of inaccuracy comes from missing people in households that do supply some information but omit individuals, or households for which information is incompletely given by others. The ICM not only helps fill in gaps in the address list, it represents an effective way to address the second problem. Finally, households and people occasionally submit duplicate questionnaires or are erroneously counted in the wrong locations. The ICM helps address these problems of erroneous enumeration as well. This is why a series of National Academy of Science panels over two decades recommended inclusion of an ICM-like adjustment in the plans for the decennial census.

17. The ICM will employ dual system estimation ("DSE") methodology to estimate the undercount in the 2000 Census. In contrast to the use of sampling in the NRFU, which is designed to produce higher quality estimates for non-responding households, the sampling for the ICM is designed to "correct" the results of the initial attempt to enumerate the population through the mailing campaign and the NRFU. It is a separate and

independent count of members of households in a very large nationwide sample of blocks.

18. DSE is an old procedure, used since the late 1800's, and is widely accepted among statisticians. It is most commonly used in estimating the size of wildlife populations, where it is known as the "capture-recapture" technique. DSE is based upon well-known counting methodologies and is well documented in statistical literature. Stephen Fienberg. *Ethical and Modeling Considerations in Correcting the Results of the 1990 Census*. Ethics in Modelling (W.A. Wallace, ed.), (1994), Pergamon, 103-144; *Bibliography on capture-recapture modelling with application to census undercount adjustment*, Survey Methodology, 18 (1992), 143-154. A standard statistical encyclopedia article on statistical estimation uses capture-recapture methods at its opening example. D.L. Burkholder. *Estimation: Point Estimation*, in W.H. Kruskal and J.M. Tanur, eds. International Encyclopedia on Statistics (New York: The Free Press) (1978), pp. 251-259.

19. We can explain the DSE method using a simple example. Consider a marine biologist wishing to estimate the number of fish in a lake. The biologist can accomplish this by twice attempting to catch and count each fish in the lake. In order to keep track of which fish are counted the first time, the biologist marks each fish before releasing it. As the fish are caught the second time, the biologist can use the marks to determine whether each fish was counted in the first attempt. He can use information from both counts to derive a more accurate assessment of the size of the fish population than that resulting from only one of the two counts.

20. More specifically, suppose the biologist counts 200 fish the first time and 150 fish the second time. Suppose further that of the 150 fish counted the second time, 125 bore marks indicating that they had been among the 200 fish counted the first time. Thus, there are three classes of fish that have been counted - fish caught both the first time and second time (125), fish caught the first time but not the second time (75), and fish caught the second time but not the first time (25). The total number of fish in the three classes is 225, all of which have been directly observed by the biologist. Note that this number exceeds the number of fish observed in either of the two counts. The examination of the random sample—the second count—shows that 125 out of 150 fish, or  $5/6$  of the sample, had been captured in the first count. Generalizing from the sample, we can conclude that  $5/6$  of the total fish population in the lake was captured in the first count. We can thus estimate that the *total* fish population is  $200 \times 6/5 = 240$ .

21. Like the method used by the biologist in the example above, the DSE methodology in Census 2000 will involve a second round of counting the population. The first round includes the traditional counting techniques including the basic enumeration as well as the NRFU. The second round is the post-enumeration survey (PES). In the PES, the Bureau will select a nationwide probability sample of 25,000 blocks (or approximately 750,000 housing units). This sample is physically independent of data from the activities associated with the enumeration and the NRFU. In fact, the sample will actually be selected before the mailing occurs. Relying on well-trained enumerators, the Bureau will attempt to enumerate households in the

sample blocks and list every person residing there. For each of the 25,000 sample blocks, the Bureau will compare the first count with the independent second count, determining which households and household members were included erroneously or represent duplicates. Then the Bureau will attempt to match housing units and persons. The result is a simple set of improved counts for the sample of 25,000 blocks. The results for the sample are then applied to every block in the nation.

22. The use of DSE in the 2000 Census has been several years in the making and is an implementation of the recommendations from the two panels from the National Research Council's Committee on National Statistics. B. Edmonston and C. Schultze, eds., *Modernizing the U.S. Census*, Panel on Census Requirements in the Year 2000 and Beyond, Committee on National Statistics, National Research Council (National Academy Press, 1995); D. Steffey and N. Bradburn, eds., *Counting People in the Information Age*, Panel to Evaluate Alternative Census Methods, Committee on National Statistics, National Research Council (National Academy Press, 1994). It is founded on the basically successful PES in 1990 and then improved upon as a result of the research the Bureau has done since 1990. In particular, it reflects the results of the research leading up to and including the results of the 1995 test census.

23. The DSE methodology has been employed in the past two censuses to evaluate census quality. The methodology has undergone substantial review and improvement by the Bureau, with special and extensive input from panels at the National Academy of Sciences,



and by experts in statistical methodology from across the country. ICM methodology is generally accepted as the most reliable method to improve census results. Bureau of the Census. *Report to Congress-the Plan for Census 2000*. (Government Printing Office: August 1998).

**(b) Evolution of Methodologies for Determining Undercount Leading to DSE**

24. After it realized the extent of the differential undercount following the 1940 Census, the Bureau embarked on vigorous efforts to measure the undercount. It carried out a series of coverage evaluation projects aimed at measuring undercounts, overcounts, and erroneous enumerations using a variety of techniques. Demographic analysis emerged early on as the primary tool for evaluating coverage at the national level. Demographic analysis uses data on births, deaths, immigration and emigration to determine the number of persons residing nationally.

25. While helpful for estimating the net undercount at a national level, demographic analysis has serious shortcomings, chief among them being that it is subject to significant uncertainty due to the difficulty in determining its components, especially emigration and net illegal immigration. U.S. Bureau of the Census. *Conference on Census Undercount*. (Government Printing Office, Washington D.C., 1980). Demographic analysis is also unable to pinpoint exactly why the undercount (or overcount) or where it occurs. As an aggregate methodology, it cannot identify which particular individuals were missed, nor can it provide more specific information on the sources of undercount.

26. To overcome the disadvantages of demographic analysis, the Bureau developed new techniques, particularly the Post Enumeration Survey (PES). Following the 1950 Census, the Bureau attempted a sample reenumeration of to the country to try to identify households missed by the enumerators, household members who were not reported within households, as well as other classification and categorization errors in the original enumeration. The Bureau then matched the information from the sample survey to the original census forms and developed estimates of the quality of the original count. The PES revealed that in 1950, as in the 1940 Census, there was an undercount and poorer coverage of non-whites.

27. The PES also uncovered only 40% of the "net underenumeration" expected from demographic analysis. The Bureau later explained that the PES was very successful in finding places that the original census enumerator had missed but was much less effective in uncovering missed persons. Leon Pritzker and N.D. Rothwell. *Procedural difficulties in taking past censuses in predominantly negro, puerto rican, and mexican areas*. In David Heer, editor, *Social Statistics and the City*, pages 55-79. (Joint Center for Urban Studies of M.I.T. and Harvard University, Cambridge, CA 1968).

28. By the time the Bureau started planning for the 1980 Census, Bureau officials and their critics had come to realize that while it might be possible to improve the actual enumeration, it would probably not be possible to eliminate the differential undercount through traditional means of enumeration, either by a mail or a house-to-house count. S. E. Fienberg and M. Anderson.

*Who Counts? The Politics of Census Taking in Contemporary America* (New York, Russell Sage, forthcoming) at 36. As a result, a serious discussion about the possibility of developing an accurate "adjustment" or "correction" ensued.

29. The 1980 Census arrived, however, before any consensus had emerged on the proper method for adjustment. Consequently, the Bureau adopted a stop-gap method for measuring the undercount, referred to as the post-enumeration program (PEP). The PEP attempted to match the April and August Current Population Survey (CPS) respondents to the April census enumeration. The CPS is a survey conducted every month by the Bureau to produce the national unemployment rate.

30. The PEP avoided some of the problems of demographic analysis because it did not require the estimation of demographic patterns (for example, illegal immigration), that affected demographic analysis. The PEP, however, suffered from positive "correlation bias," meaning that being missed in the census was positively correlated with being missed in the second list. The result was an underestimation of the actual population size but an improvement over the unadjusted value. Howard Hogan and Kirk M. Wolter. *Measuring accuracy in a post-enumeration survey*. Survey Methodology, 14:99-116, 1988. It also suffered from the fact that the data gathered from the August CPS were obtained months after the April PEP, resulting in further error.

31. In the 1980 PEP, the Bureau took a sample of 110,000 households from the census, selected in clusters of approximately 10 housing units per enumeration

district, and matched it to the households in the April and August CPS, each containing approximately 84,000 households. The Bureau produced estimated undercounts for the U.S. as a whole, as well as for all 50 states and several large local areas. S. E. Fienberg and M. Anderson. *Who Counts? The Politics of Census Taking in Contemporary America* (New York, Russell Sage, forthcoming) at 58.

31. In 1990, the Bureau revised its PES methodology in order to better estimate the differential undercount. Instead of relying upon a survey designed for an entirely different purpose, (the CPS), it designed a new PES directly linked to census geography. The Bureau implemented this approach in a 1986 test of adjustment-related operations in Los Angeles.

32 A major difference between the 1990 Census and the 2000 Census is in the sample size of the ICM. The 1990 Census PES gathered survey information from the inhabitants of approximately 5,000 blocks across the nation. The final design for the 1990 PES involved checking on the occupants of 165,000 households nationwide. By contrast, the 2000 Census ICM will select 25,000 blocks and ultimately obtain information from the occupants of 750,000 housing units. This 5-fold increase in sample size is expected to produce far greater accuracy in the ICM, and to allow for a new approach to estimating a correction for every block on a state by state basis. Bureau of the Census. *Report to Congress-The Plan for Census 2000*. (Government Printing Office: August 1998).

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(c) **Selecting the ICM Sample**

34. Undercount rates differ for different kinds of blocks. One would not expect the DSE estimate of the net undercount rate for a block in the heart of Washington, D.C. to tell us very much about the net undercount in Langley, Virginia. Accordingly, in selecting the ICM sample, the Bureau starts with a list of all the blocks or equivalent-size rural units in the United States, then groups blocks into categories (or "strata") according to both geography and their demographic characteristics. Such characteristics might include racial composition, proportion of homeowners to renters, and average household size. Rates of undercount for each stratum are determined by measuring the undercount of a sample of blocks within the stratum by DSE. The undercount rate of these blocks is then applied to the other blocks in that stratum. The final ICM step to complete the census enumeration consists of correcting the raw census count for each stratum to take into account estimated omissions and erroneous enumerations in that stratum.

35. There is a key difference between the strata used in the 1990 Census PES and the strata planned for the 2000 Census. In the 1990 Census PES, the strata *crossed* state lines. In the 2000 Census ICM, separate strata will be established *within* each state. The use of customized strata for each state is expected to produce greater accuracy. *Bureau of the Census Report to Congress-The Plan for Census 2000* (Government Printing Office: August 1998).

### Expected Error Rate in the 2000 Census Without Sampling

36. As we discussed previously, errors in the census can arise from many sources. Errors are grouped into two basic types—those that occurred during the measuring or data collection process (non-sampling error) and errors that occur because only part of the population is being directly contacted (sampling). Non-sampling error and its consequent biases are present throughout the census process and can reduce the quality of results *far more* than sampling errors. The most harmful type of non-sampling error is coverage error, which arises from two general problems—missing entire housing units, and missing some or all of the people in an enumerated unit. Based on the 1990 results, 69.5% of the coverage errors came from enumerated housing units, and the remaining 30.5% came from housing units that were not enumerated at all. Bureau of the Census. *Report to Congress-The Plan for Census 2000*. (Government Printing Office: August 1998) at 41.

37. There are three types of coverage error—omissions, duplicates, and erroneous inclusions. Omissions occur when housing units or people are missed. Duplicates occur when housing units or people are included more than once. Erroneous inclusions occur when people are incorrectly included in the initial enumeration because they are fictitious, in the wrong location, etc.

38. These three types of coverage error can be combined to produce either a figure for *net* error or *gross* error numbers. “Gross error” refers to the *total*

number of errors made in the census, while “net error” refers to the combined effect of these errors on the resulting statistics. For gross error, the effect is additive—the sum of people omitted plus duplicates plus erroneous inclusions. For net error, the errors are treated as an excess (duplicates and erroneous inclusions) or a deficit (omission), depending on the type of error, and the effect of combining produces a canceling-out effect. Gross error measures the total number of mistakes in the census—net error measures the net undercount and, as we will explain, this can be a misleading measure of the quality of the census count.

39. The 1990 Census had a net undercount of approximately 4 million people. Bureau of the Census. *Report to Congress-the Plan for Census 2000*. (Government Printing Office: August 1998). The gross error was more than 26 million people: 15 million people who were not counted at all (or were not counted in the correct block) and 11 million people who were incorrectly included in a block. The net number of people not included in the national total represents the 4 million national net undercount. Bureau of the Census. *Report to Congress-the Plan for Census 2000*. (Government Printing Office: August 1998). Those who say that the 1990 Census was the most accurate census error are mistaken. They are talking about net national error. Even if the net national undercount were zero, this would tell us nothing about how omissions and erroneous enumerations are distributed over all blocks in the nation.

40. The Bureau has estimated that the net error under its proposed plan will be 1.1% at the census tract level, 0.6% at the congressional district level, 0.5% at



the state level, and 0.1% at the national level. The projected net error from a physical enumeration with no sampling in 2000 **would average 1.9% at all levels** from the census tract level to the national level:

	National	States	Congressional Districts
The Census 2000 Plan	.01%	0.5% (0.2% - 0.5%)	0.6% (0.3% - 2.3%)
Improved procedures without any sampling	1.9%	1.9% (0.4% - 3.2%)	1.9% (-1.2% - 7.0%)

Census Tracts***
1.1% (0.6% - 2.4%)
1.9% (-1.2% - 6.2%)

Bureau of the Census. *Report to Congress-The Plan for Census 2000*. (Government Printing Office: August 1998) at 44.

#### **Plaintiff's Criticism of the 2000 Census Plan is Unfounded**

41. Plaintiff contends that the Bureau has "adopted a program for conducting the 2000 Census that abandons any attempt to locate all persons who can be

\*\*\* The range of error at the census tract level has been "trimmed" so that it does not include the most extreme outlier—the highest and lowest 3 percent.

found and count them" and will "instead . . . estimate the population using statistical methods commonly referred to as 'samplings.'" (Memorandum at 1). This statement is false. As we explained above, the Bureau begins with an attempt at a full enumeration and only then makes limited use of sampling to: (1) estimate responses for a large fraction of the households which did not return their mail questionnaires, were not contacted by telephone, or were not counted through other traditional means, and (2) achieve an accurate assessment of those persons who were missed by the original enumeration. Thus, plaintiff's claim that the Bureau proposes to "estimate the population" by statistical methodologies is flat wrong.

42. Plaintiff erroneously states that Thomas Jefferson "was familiar with methods of statistical estimation, having used them effectively in his 1782 survey of Virginia's population . . ." (Memorandum at 12). Jefferson could not have used statistical estimation because it was still being developed. Perhaps the earliest known attempt to do statistical estimation was by Pierre Simon Laplace in 1783, who used a form of ratio estimation to produce a statistical estimate of the population of France. Laplace P.S. (1786). *Sur les naissances, les mariages et les morts a Paris depuis 1771 jusqu'en 1784; et dans toute l'entendue de la France, pendant les annees 1781 et 1782*. Mem. Acad. Sci. (1783), pp. 693-702. It was many years before Laplace's idea would lead to the development of a theory of statistical estimation and 160 years before it would be used again in a census context. Jefferson could not have used probability sampling methods because these methods were not developed for another 120-130 years. For example, see the discussion on the

use of probability sampling in S.E. Fienberg and J.M. Tanur, *A historical perspective on the institutional basis for survey research in the United States*, Survey Methodology, 16 (1990) 31-50; S.E. Fienberg and J.M. Tanur, *Reconsidering Neuman on experimentation and sampling: Controversies and fundamental contributions*, Probability and Mathematical Statistics, 15 (1995) 47-60. Jefferson was simply making an educated guess based on the information he had.

43. Plaintiff's claim that "a number of well-known experts have 'disagreed sharply' with the Academy's recommendation that statistical sampling would increase the accuracy and lower the costs of the 2000 Census (Memorandum at 16) is purposely vague. To my knowledge, there are only a handful of statisticians who are on record as opposing the use of statistical sampling and estimation methodologies in 2000 Census, including the two statisticians relied upon by plaintiff (Freedman and Wachter). (Memorandum at 16-17).

44. Plaintiff states that "the Government Accounting Office (GAO) has concluded that sampling for non-response follow-up will be less accurate than complete enumerations." (Memorandum at 19). By definition, a "complete enumeration" will produce 100% accuracy. The problem is that it is not possible for the Bureau to obtain a "complete enumeration." Experience tells us that the Bureau cannot come close to achieving this goal. In all censuses in the last several decades, the Bureau's attempts to reach those missed failed and induced additional error into the census counts. Further, plaintiff has totally distorted the GAO's position on statistical sampling. Contrary to plaintiff's assertion, the GAO *never said* that sampling for nonresponse

follow-up was "less accurate" than enumeration. What the GAO *did say* is the combination of the enumeration and the ICM might produce superior results, but that it lacked the data to make any judgment on this issue.

In our July 1997 report, we noted that sampling for follow-up could reduce cost and save time, while the ICM could improve the accuracy of the population totals.

45. Plaintiffs argue that, with respect to the ICM, "[T]he blocks picked for the sample will not be random" (Memorandum at 20), implying that the ICM will be inaccurate. Plaintiff's statement is incorrect. The sample is a randomly selected, stratified sampling of blocks: "The Census Bureau plans to classify each of the country's 7 million blocks into categories known as strata and will select blocks at random from each stratum for a total of 25,000 blocks." Bureau of the Census. *Report to Congress-The Plan for Census 2000*. (Government Printing Office: August 1998).

46. Plaintiff's statement that the post-strata are based on the Bureau's "subjective assumptions" about how various racial and ethnic groups will respond to the census is false. While there is no single definition of the design of such groupings, two decades of research have demonstrated that creating such groupings is better than none at all.

47. Plaintiff alleges that "many have questioned the operational feasibility" of the ICM, including the GAO (Memorandum at 22), citing GAO Report to the COMM on Governmental Affairs, U.S. Senate, 2000 Census: Preparations for Dress Rehearsal Leave Many Unanswered Questions (GAO/GGB-98-74) (March



1998). That report supports the use of statistical sampling and the ICM. In that report, the GAO expressed its concern with the enumeration component of the proposed plan, including the Bureau's ability to hire qualified enumerators and interviewers. The use of statistical sampling methodologies in Census 2000 will help to minimize this problem. Also, plaintiff's use of the term "many" is deliberately misleading.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 4th day of May, 1998.

/s/ STEPHEN E. FIENBERG  
STEPHEN E. FIENBERG

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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CASE No. 1:98CV00456-RCL

UNITED STATES HOUSE OF  
REPRESENTATIVES, PLAINTIFF

v.

THE UNITED STATES DEPARTMENT OF  
COMMERCE, ET AL. DEFENDANTS AND  
CITY OF LOS ANGELES, ET AL.,  
PROPOSED INTERVENOR-DEFENDANTS

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THREE JUDGE COURT

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DECLARATION OF JACK N. RAKOVE

Jack Rakove declares:

1. I am the Coe Professor of History and American Studies at Stanford University, where I have taught since 1980, and where I also hold appointments as Professor (by courtesy) of Political Science and (beginning next year) of Law. Since 1997, I have also been a Visiting Professor of Law at New York University School of Law. I was educated at Haverford College, where I earned an A.B. with honors in History in 1968; the University of Edinburgh, Scotland, where I studied in 1966-67; and Harvard University, where I earned a Ph.D. in History in 1975. My principal field of scholarship is the political history of the American Revolutionary era, and my scholarly writings have been largely concerned with the process of the creation of a national government under both the Articles of Confederation and the Constitution. I have also written a number of scholarly articles concerned with the political thought and career of James Madison, usually recognized as the leading framer and original interpreter of the Constitution. Since 1983, I have also been interested in demonstrating what historians can contribute to the ongoing debate over the theory of "originalism" in constitutional interpretation. My major works include the following:

[a] *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Knopf, 1979), which surveys both the political history of the Continental Congress to 1787 and the process of drafting, ratifying, and attempting to amend the Articles of Confederation.

[b] *James Madison and the Creation of the American Republic* (Glenview, Ill.: Scott Forsman, 1990)

[c] ed., *Interpreting the Constitution: The Debate over Original Intent* (Boston: Northeastern University Press, 1990), a reader of leading essays on the problems that originalism poses for both constitutional law and theory and historical inquiry

[d] *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), which examines both the history of the adoption of the Constitution and the problems and challenges that efforts to make sense of the extant documentary record pose for both the proponents and critics of originalism. *Original Meanings* is the recipient of three book prizes: the Pulitzer Prize for History (1997), the Fraunces Tavern Museum Book Award (1997), and the Book Prize of the Order of the Cincinnati (1998); (the latter two prizes are awarded within the field of American Revolutionary history).

[e] *Declaring Rights: A Brief History with Documents* (Boston: Bedford, 1997).

2. The general constitutional question raised in the pending census litigation is partially addressed in chapter IV of *Original Meanings*, especially at pp. 70-74. That chapter is primarily concerned with the two sets of compromises over issues of representation that dominated the first seven weeks of debate at the Constitutional Convention of 1787. The first set of issues concerned the dispute between "small" and "large" states, which culminated in the decision of July



16, 1787 giving each state an equal vote in the Senate. The second set of issues, which is far more pertinent to this litigation, concerned the initial allocation and future reapportionment of seats in the House of Representatives. This dispute was essentially settled in the days immediately preceding the "Great Compromise" of July 16, with the acceptance of the principle that representation in the House and direct taxation (for example, poll taxes) would both be allocated among the states on the basis of population, with slaves being counted at the ratio of three to five (the so-called three-fifths clause). Here the lines of conflict followed largely sectional lines that divided the delegates into blocs of northern and southern states. Because northern states would hold the initial majority in both houses of the new Congress, southern delegates had a strong incentive to secure a constitutional mandate for future reapportionment, especially since it was then believed that future population growth and migration into the interior of the continent would work to the advantage of their region. Southern delegates at the Constitutional Convention also sought to receive credit for their enslaved population, on two distinct grounds. First, slaves contributed significantly to the national economy, and thus to the revenues on which the new government would rely. Second, some southern delegates, reacting to the emergence of antislavery sentiment in the northern states, conceded that this additional political credit would help protect the institution on which their society rested. Discussion of the census was driven primarily by these concerns, and southern delegates—most notably Governor Edmund Randolph of Virginia—took the lead in insisting that rules for periodic reapportionment on the basis of a census should be locked into the text of the

Constitution, not left to the discretion of future Congresses, which might permit the northern states to preserve their initial majority. In these discussions, however, consideration of *how* census data would be gathered was always a distinctly secondary concern. A careful reading of the relevant debates clearly indicates that the delegates were nearly always discussing the actual rule of reapportionment, not the method of conducting the census.

3. It was on the basis of having examined the politics of the reapportionment question in *Original Meanings* that I submitted to the *Washington Post* an essay challenging the idea that the Constitution creates a barrier to the use of modern statistical sampling procedures to supplement the traditional methods of household-by-household collection of population data. That article was published in the Outlook section of the *Post* on March 15, 1998 (page C2), under the title "Counting on Madison in the Census Dispute." I have subsequently reviewed the brief filed in this litigation, as well as reviewed extant records of debate relevant to this question.

4. The standard source upon which scholars rely to understand the debates at the Constitutional Convention is Max Farrand, ed., *The Records of the Federal Convention of 1787*, first published by Yale University Press in 1911, and then republished in 1937, 1966, and 1987. Concurrently with the last republication, the same press issued James H. Hutson, ed., *Supplement to Max Farrand's The Records of the Federal Convention of 1787* (1987), which contains both documents included in the fourth supplemental volume of the original series as well as other sources discovered since. To recover how the Constitution was understood by the American

public in general and its ratifiers in particular, historians now rely on the materials gathered in John P. Kaminski and Gaspare J. Saladino, eds., *The Documentary History of the Ratification of the Constitution* (Madison: State Historical Society of Wisconsin, 1976-), which is still in process (13 volumes have appeared to date). Eventually this series will completely supersede the standard nineteenth-century source, Jonathan Elliot, ed., *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution*. Other useful compilations of sources for the ratification debates include the seven volumes of Herbert Storing, ed., *The Complete Anti-Federalist* (Chicago: University of Chicago Press, 1987), and the recent two-volume set edited by Bernard Bailyn, *The Debate on the Constitution* (New York: Library of America, 1993). There are numerous editions of *The Federalist*, the celebrated defense of the Constitution written largely by James Madison and Alexander Hamilton.

5. The constitutional objections to the use of sampling procedures for the purpose of reapportioning the allocation of seats in the House of Representatives (and, by extension, each state's vote in the Electoral College) largely depend on the presence of the term "actual Enumeration" in the sentence mandating that the first census be taken within three years of the first meeting of the new Congress under the Constitution and every ten years thereafter, "in such Manner as they [Congress] shall by Law direct." Plaintiffs contend that "actual Enumeration" excludes any form of estimating that Congress might otherwise adopt under the final phrase of this sentence. In support of this claim, their brief cites various statements made by the delegates at

Philadelphia, and other sources (notably *Federalist* 54), to suggest that the framers were primarily concerned with avoiding the political manipulation of reapportionment that would occur if Congress could juggle the mode of collecting census data at its discretion. In the plaintiffs' account, a concern with authorizing one and one mode only of gathering data outweighed any substantive concern with the ultimate accuracy of the count. But the "permanent & precise standard" that delegates such as George Mason (quoted here) sought was to be determined by establishing a constitutional rule of reapportionment itself, not by specifying a mode of collecting data. What was at issue throughout this controversy, and what the delegates were explicitly addressing, were fundamental principles of representation itself. Was it legitimate or not to count slaves for purposes of representation, even though they could never be regarded as citizens in any sense of the term? Could the Union itself last if equitable rules for reapportionment were not explicitly incorporated in the text of the Constitution, to assure Americans that they would not sacrifice or dilute their political rights by migrating westward? If representation was to be based on both persons and property—as the link to direct taxation and the inclusion of slaves suggested—was not a simple population count the most accurate and convenient index of wealth? These were the true questions that the delegates addressed in early July 1787—not the secondary matter of exactly how census data was to be compiled. That subject was in fact never debated *per se*; it was discussed only within the context of asking whether a population count provided the most convenient method of estimating wealth.



6. To evaluate the plaintiffs' claim on historical grounds requires at least two things: an effort to trace the evolution of the relevant provisions of Article I, Sect. 2, Clause 3, through the course of the Convention; and a close attention to the context in which particular statements were made. Applying these two standard rules of historical analysis supports a different conclusion than the one reached in the plaintiffs' memorandum. Both the framers and ratifiers of the Constitution understood that the crucial provisions relating to reapportionment were those requiring that it occur at regular intervals on the basis of a census, and that the formula for reapportionment be set constitutionally, in the form of the population rule specified in the first sentence of this Section. On closer (that is, contextual) examination, the contemporary statements that plaintiffs cite in support of the framers' commitment to a particular mode of data-gathering turn out to refer instead to the crucial and divisive question of whether or not slaves should be counted for purposes of representation. In fact, almost nothing of substance was said about the question of how the data was to be collected.

7. The discussion of the census issue took place chiefly during the period July 5-12. Prior to this point, the Convention had recently deadlocked over the question of applying some rule of proportional representation to the upper house (July 2; Farrand, ed., 1 *Records* at 510), and a committee of one member from each state had just reported a "compromise" to preserve the equal-vote rule of the unicameral Continental Congress in the new Senate (July 5; Farrand, ed., 1 *Records* at 526). Almost a month earlier, however, the committee of the whole had approved a

motion to apportion representatives in the lower house according "to the whole number of white & other free Citizens & inhabitants of every age sex & condition including those bound to servitude for a term of years and three fifths of all other persons not comprehended in the foregoing description, excepting Indians not paying taxes, in each State." (June 11; Farrand, ed., 1 *Records* at 201). Glossing this motion, its author, James Wilson (Pa.) noted that it would "requir[e] a census only every 5-7, or 10 years" (ibid.). One alternative the Convention had just discussed—to proportion representation to each state's contributions to the national treasury—might presumably introduce more variance from one session to the next, with the ebb and flow of trade and tax revenues, producing greater inequity if representation was not reapportioned more frequently. The rule proposed by Wilson was also endorsed in the July 5 report of the compromise committee on the deadlock over the Senate. That report also recommended that each state receive one representative for every 40,000 inhabitants, including slaves calculated according to the three-fifths rule (Farrand, ed., 1 *Records* at 526).

8. The Convention returned to the issue of apportionment in the House of Representatives in early July. On July 5 and 6, the Convention debated whether the rule of apportionment should be based on population solely, or whether representation should not be tied to property or wealth as well. On July 6 the Convention appointed a five-member committee to consider the part of the compromise committee's report relating to apportionment in the House. (Farrand, ed., 1 *Records* at 542). This committee in turn reported on July 9, proposing an initial allocation of 56 House seats

among the thirteen states. When pressed to explain the basis on which they had allocated seats, committee members conceded that they had tried to combine population and wealth in some unspecified way. Equally important, they recommended that future Congresses be authorized "to augment the number of representatives" for the existing states and "to regulate the number of Representatives" in cases where states were either divided or united, or newly created, "upon the principles of their wealth and number of inhabitants." The comments recorded by James Madison on this part of the report indicate that the delegates were concerned with the question of whether or not wealth should count for purposes of representation, whether slaves should be counted at all (William Paterson), and whether the timing of reapportionment should be left to the discretion of Congress (Edmund Randolph). Discussion ended with a decision to recommit this part of the report to a new committee of one delegate from each state. (Farrand, ed., 1 *Records* at 559-62). That committee reported the next day, July 10, recommending enlarging the size of the first House to 65 members. Discussion of this report indicated a measure of sectional mistrust (Farrand, ed., 1 *Records* at 566-70).

9. After the Convention approved this initial allocation on July 10, Governor Edmund Randolph of Virginia moved "that in order to ascertain the alterations in the population & wealth of the several States the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every years thereafter—and that the Legis[latu]re arrange the Representation accordingly." (Farrand, ed., 1 *Records* at 57-71). On the

next day, Randolph accepted a substitute resolution from Hugh Williamson of North Carolina, which stated "that in order to ascertain the alterations that may happen in the population & wealth of the several States, a census shall be taken of the free white inhabitants and  $\frac{3}{5}$ ths of those other descriptions on the 1st year <after this Government shall have been adopted> and every year thereafter; and that the Representation be regulated accordingly." This proposal was again modified by Randolph on July 12, but in its various forms the Randolph-Williamson resolution provided the occasion for the framers' one sustained discussion of the census.

10. The notes of this debate kept by James Madison do not support the conclusion that the framers' chief concern was to assure one mode of collecting the information required for reapportionment. It is important to note that the phrase "actual Enumeration" had not yet been introduced in any resolution or used in debate—nor would it appear in the records of deliberation for another two months. More important, both the context of this debate and the substance of the remarks indicate that the true concern was to determine a substantive rule for reapportionment, and that this concern in turn branched into several distinct but complementary questions:

a. Was wealth in one form or another a legitimate criterion or factor to be taken into account in the apportionment of representation?

b. Should a slave population overwhelmingly concentrated in the states from Maryland south be counted for purposes of representation?



c. Should a rule for reapportionment even be included in the Constitution at all, or was it not in the interest of the existing seaboard states to allow Congress to use its own discretion to decide whether, when, and how to reapportion, in order to preserve a monopoly of power for the original states against a foreseeable movement of population into the trans-Appalachian interior?

11. The last of these questions (10c) was the catalyst that drove discussions of (a) and (b), and this in turn reflected the provocative role assumed in this debate by Gouverneur Morris of Pennsylvania, who was a member of the two committees proposing the initial allocations of seats in the House. Morris candidly urged the Convention to coalesce in denying the future interior states the prospect of gaining control of the national legislature, and he accordingly resisted inserting any fixed rule for reapportionment into the prospective Constitution (see his speeches of July 10 and 11, Farrand, ed., 1 *Records* at 571, 581-82, 583-84). But his position in turn alarmed such southern delegates as Randolph (who also served on the two committees), George Mason, and Madison, just as Morris's opposition to explicitly recognizing slavery as a basis for representation irked the South Carolina delegates, who wanted to count slaves as equal to free inhabitants. Southern delegates resisted Morris's appeal for several reasons. First, like other Americans in the 1780s, they assumed (wrongly) that population movement westward would work to the regional advantage of the South, enlarging the "agricultural" interest that their region already possessed (as opposed to the "commercial" interest of the North). Second, they expected that the movement of migration in a

southwestern arc toward New Orleans would also mark an extension of the southern plantation economy. Third, as the initial minority in the nation, but also thinking that their population would later move into parity with the North's, they had an incentive to lock a rule of apportionment (the 3/5 provision) into the Constitution, and to mandate gathering the information on which reapportionment would occur. To leave these questions to the discretion of future Congresses was a formula for preserving the permanent minority status of the South.

12. In discussing whether representation was about population (or citizenship) alone, or some combination of population and wealth, the framers clearly understood the difficulty of gathering reliable estimates of the latter. Other than measuring contributions to the national treasury, there was no obvious way that this data could be reliably gathered, nor (then as now) could one easily or exactly say what form this measurement should take. Even using treasury contributions as a formula could be unjust, because most delegates assumed that the new government would rely on duties on foreign imports for the bulk of its revenues, and these would be most easily collected at ports of entry, which were hardly evenly distributed among the states even in 1787. Yet because, for political reasons, the delegates became committed to giving the slaveholding states some representational credit for their peculiar form of wealth in human beings, the framers never repudiated the idea that property was in some sense a legitimate criterion of representation. (Women, children, and indentured workers could all be regarded as citizens even if they lacked the suffrage; but slaves were legally regarded as property only, devoid of any

rights or attributes of citizenship). The framers thus adopted the fiction that population, though not a perfect way of estimating wealth, was the most convenient and accurate means of doing so available. If it was legitimate to represent slaves as a form of property—which is clearly what the Constitution originally did—their “actual Enumeration” in the census was itself, ironically, a form of estimating wealth.

13. As the comments of various speakers on July 11-12, 1787, make clear, the framers manifestly understood that the true dispute over the census was closely connected with calculations of sectional advantage, which quickly and repeatedly devolved into the question of whether or not slaves were to be counted, and if so, at what ratio. The southern insistence on an initial census and recurring censuses at fixed intervals was predicated on the assumption of future population growth working to their regional advantage, as comments by Randolph and Mason demonstrate (Farrand, ed., 1 *Records* at 578-79, 579-80, 586, 594). Given Morris's aversion (occasionally echoed by other delegates, such as Roger Sherman of Connecticut) to any constitutionally mandated census or rule of reapportionment, the key points to be established were that a census had to occur and recur, and that the rule of allocating seats could not be left to the discretion of a northern-dominated Congress. Questions about the mode of gathering data were never explicitly addressed as such, with the sole exception being Randolph's early comment that “The census must be taken under the direction of the General Legislature. The States will be too much interested to take an impartial one themselves.” (Farrand, ed., 1 *Records* at 580.)

14. After the debates of July 10-11, the census issue never again became a subject of active debate, but its evolution can be traced discretely. In late July, the Convention recessed while a Committee of Detail converted the resolutions adopted thus far into a working draft of the Constitution. As the census provisions came to the committee, the new Congress could still be said to have some discretionary authority to decide whether or not reapportionment should occur. The operative language stated that it “shall be authorised from Time to Time to apportion the number of Representatives” for the original states, and that it “shall possess Authority to regulate the Number of Representatives” in cases of states dividing, uniting, or being created, though in all these cases it would have to follow the basic population rule laid down (Farrand, ed., 2 *Records* at 130-31). In its report of August 6, however, the committee of detail recommended tightening this language significantly, so that the operative language now said that “the Legislature shall, in each of these cases, regulate the number of representatives by the number of inhabitants, according to the provisions herein after made” (Farrand, ed., 2 *Records* at 178, and cf. 182, where the population rule now appears in a separate clause that omits any explicit reference to representation. Given that many of the framers were morally embarrassed about their concession to slavery, the committee may have broken up this clause in order to obscure the relation between slavery and representation. The connection was clarified on August 8; *ibid.* 219.)

15. Until literally one week before the adjournment of the Convention, the key term at dispute in this litigation (“actual Enumeration”) had as yet not been



heard. The resolutions reported to the Committee of Style appointed to prepare the final, polished draft of the Constitution still provided that representation in the House and direct taxation "shall be regulated by the whole number of free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within three years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct" (Farrand, ed., 2 *Records* at 571). When the committee reported its draft to the Convention on September 12 (five days before adjournment), the clause had been revised to its almost final form, and the second sentence now read "The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct." (Farrand, ed., 2 *Records* at 590-91.)

16. While it is plausible to infer that the insertion of this term did tighten the language of Article I, Section 2, the extant sources do not enable us to speak with any great confidence about how the delegates understood the import of this change. When this provision came up for debate on September 13, the framers devoted their brief comments to two other points. They substituted "service" for "servitude" in the passage relating to indentured servants, the word *servitude* "being thought to express the condition of slaves"; and they rejected a motion to eliminate the reference to "direct taxation" in a clause otherwise concerned with representation,

because as Gouverneur Morris, with his usual candor, reminded them, the reference to taxation served as a fig leaf to legitimate the counting of slaves for purposes of representation. (Farrand, ed., 2 *Records* at 607-8.) The adoption of the phrase "actual Enumeration" escaped comment; its meaning and import went undiscussed. The sentence in which it was embedded was still concerned primarily with the question of the frequency with which a census would occur, and its concluding clause still gave Congress discretion to determine how the census would be conducted.

17. A further reference to the census as an enumeration can be found in Article I, section 9. The report of the Committee of Style included a provision stating that "No capitation tax shall be laid, unless in proportion to the census herein before directed to be taken." In the final round of textual corrections that took place during the last few days of the Convention, this clause was modified in two ways:

(a) at the motion of George Read of Delaware, the phrase "or other direct tax" was inserted after "capitation";

(b) and of more interest, and in the exact language of Madison's notes, "On motion of Col: [George] Mason, 'or enumeration' inserted after, as explanatory of 'census'". (Farrand, ed., 2 *Records* at 596, 618; and for further documentation, see Hutson, ed., *Supplement*, 269.)

Two delegations (Connecticut and South Carolina) opposed this change, but Madison recorded no debate on it. At this point in the Convention, many delegates were anxious to conciliate Mason, who had already

indicated that he was unlikely to sign the completed Constitution.

18. One conclusion seems certain: neither in July nor September did the framers discuss what an enumeration would entail in administrative terms. Nor did they have occasion to consider whether advances in statistical sampling procedures (which did not even exist at the time, in the strict sense of the term) would be constitutionally impermissible if empirical evidence existed to suggest that household-by-household enumeration was defective.

19. Plaintiffs' brief makes only occasional reference to contemporary sources other than the *Records of the Federal Convention*, and with good reason, because the census itself was not a important subject of discussion during the ensuing public debate over ratification. As is often the case with the ratification materials, the most rewarding source is *The Federalist*. The most salient essay, *Federalist 54* (written by Madison), which is cited in plaintiffs' brief, is from start to finish a defense (albeit a not unambivalent one) of the three-fifths clause of the Constitution, confirming that it was the rule for the apportionment of representation and direct taxation, not the mode of gathering the requisite population data, that Madison deemed controversial and thus requiring defense. Moreover, in the concluding paragraph of this essay, Madison implied that the actual taking of the census might yet devolve upon the states, noting the possibility that if the census were to be used solely for representation or for taxation, states would have an incentive either "to swell or reduce the amount of their numbers" respectively. The factor that will promote "the accuracy of the census," Madison suggested, will be the balancing force the dual factors of

representation and taxation will exert—not the language requiring an "actual Enumeration."

20. In summary, the preponderance of the extant documentary evidence from the constitutional debates of 1787-88 supports the conclusion that the preeminent issue was whether the Constitution should contain an explicit rule for reapportioning the House of Representatives (and by extension, the Electoral College). A census was necessary to provide the information on which reapportionment would take place, and the concern of the initial minority region (the southern states) that they and the new states in the interior receive both just treatment and the political advantages they expected to gain dictated that the census and reapportionment occur at fixed intervals. Little of substance was said, however, about the means whereby the necessary information would be collected. The key phrase "actual Enumeration" was introduced in the text of the Constitution only during the Convention's final week, through the editorial labors of the Committee of Style, and no discussion of its meaning and import was recorded.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29th day of April, 1998.

/s/ JACK N. RAKOVE  
JACK N. RAKOVE



UNITED STATES DEPARTMENT OF COMMERCE  
Bureau of the Census  
Washington, DC 20233-0001

[Stamped "Jan 02, 1998"]

CENSUS 2000 DECISION MEMORANDUM NO. 34

MEMORANDUM FOR John H. Thompson  
Associate Director for  
Decennial Census

From: Ruth Ann Killion /s/ RAK  
Chief, Decennial Statistical  
Studies Division

Subject: Decision to Increase Nonre-  
sponse Followup Sampling  
Rates for High Response  
Tracts

The Plan for Census 2000 as it relates to sampling for nonresponse followup (NRFU) has been changed. The Census Bureau's modified plan, announced in March, 1997, included Direct Sampling for NRFU. This decision changes Direct Sampling to improve equity among tracts.

Direct Sampling, as detailed in the March, 1997, Plan for Census 2000, includes sample sizes equal to the number of nonrespondent addresses needed to raise each tract completion rate<sup>1</sup> to 90 percent, or equal to 10 percent of the remaining nonrespondents, whichever is

<sup>1</sup> DSSD 1998 Dress Rehearsal Memorandum Series E-3 and DSSD Census 2000 Memorandum Series R-5 from Killion to Thompson, "Response and Completion Rates for the 1998 Dress Rehearsal and Census 2000."

larger. Thus tracts with high response rates will have significantly lower sampling rates than other rates, as shown below:

<u>Initial Response Rate</u>	<u>Sampling Rate Under Old Plan</u>
60%	3-in-4
70%	2-in-3
80%	1-in-2
85%	1-in-3
90%	1-in-10

These lower sampling rates translate to higher sampling errors. A simulation conducted by the National Research Council<sup>2</sup> demonstrates this relationship:

<u>Initial Response Rate</u>	<u>Coefficient of Variation (%)</u>
60%	.63
70%	.67
80%	.77
90%	1.64

This modification of Direct Sampling will remedy the inequitable treatment of high response tracts. A number of alternatives were researched by analyzing the effect of different sampling rates on statistical accuracy and field workloads. Direct Sampling will continue to sample at the rate required to raise each tract completion rate to 90 percent. However, for tracts with an

<sup>2</sup> National Research Council, Committee on National Statistics, "Preparing for the 2000 Census: Interim Report II," June, 1997.

initial response rate of at least 85 percent, the sampling rate will be 1-in-3. This modification is summarized below:

<u>Initial Response Rate</u>	<u>Sampling Rate Under New Plan</u>
IRR_85%	Large enough to get to 90%
85% < IRR	1-in-3

In simulations conducted with 1990 Census operational data, this change had a positive effect on sampling errors, with a minor effect on budget and workloads. A simulation using 1990 Census operational data produced coefficients of variation (CV's) with the following distributions under the old and new Direct Sampling plans<sup>3</sup>:

	<u>Minimum</u>	<u>Weighted Mean</u>	<u>Maximum</u>
Old Plan	0%	1.1%	97.9%
New Plan	0%	1.1%	46.2%

Using the simulation method of the National Research Council, the sampling errors for high response tracts are significantly reduced, as shown below:

<sup>3</sup> CV's in this table include variation due to sampling for Integrated Coverage Measurement as well as NRFU sampling. Also, CV's are presented in terms of estimated population in the year 2000.

<u>Initial Response Rate</u>	<u>Old Plan CV</u>	<u>New Plan CV</u>
85%	.95	.95
90%	1.64	.77
95%	1.16	.55

Increased sampling for high response tracts does increase costs, but not enough to prevent acceptance of the modification. In the operational data simulation, only about 17% of all tracts are affected by the modification. And since those tracts had high mail response, they generally had few nonrespondent units, meaning the workload increases are not significant. Overall, the national NRFU sample rises from 22.18 million units to 22.47 million units, a difference of 290 thousand.<sup>4</sup> In the 10,077 tracts affected by the increased NRFU sampling rate, the sample size increases from 492,582 units to 781,054 units. The estimated total cost increases approximately \$10 million.

Our goal is to ensure equity of the NRFU sampling. Given the fact that increased sampling rates for certain tracts addresses this concern with little effect on cost, we have decided to change the plan for Census 2000 to include higher sampling rates for high response tracts.

I concur with the recommended revision to the non-response followup sampling rate.

<sup>4</sup> All housing unit figures in this section are in terms of estimated Census 2000 housing units. Workload figures do not include followup of undeliverable-as-addressed vacant housing units.



/s/ PRESTON JAYWAITE  
 JOHN H. THOMPSON  
 Associate Director for  
 Decennial Census

1/2/98 -  
 Date

cc: Distribution List

# **DECLARATION OF LEOBARDO F. ESTRADA**

I, Leobardo F. Estrada, hereby declare as follows:

1. I currently hold a position as Associate Professor of Urban Planning at the School of Public Policy and Social Research, University of California, Los Angeles. I have been at U.C.L.A. since 1977. Prior to that, I held academic positions at the University of North Texas, University of Texas at El Paso, and Institute for Social Research at the University of Michigan at Ann Arbor. I received my B.A. degree from Baylor University in 1966, and my M.S. and Ph.D degrees from Florida State University in 1968 and 1970. Attached hereto as Exhibit A is my most current *curriculum vitae*.

2. I have twice provided professional services to the U.S. Bureau of the Census. From 1975-1977, I served as an Assistant to the Division Chief, Population Division. From 1979-1980, I served as Staff Assistant to the Deputy Director, and in that capacity I helped to manage the 1980 Census. I have also served on the Hispanic Census Advisory Committees on the 1980 and 1990 Census, and was one of eight members of the national panel, constituted to individually advise the Secretary of Commerce on technical aspects related to the possible adjustment of the 1990 Census. My recommendation to the then Secretary of Commerce, Robert Mosbacher, was that the Post-Enumeration Survey be used to adjust the 1990 Census.

3. My areas of expertise are in demographic studies, racial and ethnic statistics, particularly on the Latino population of the southwestern U.S. I have several publications on Latino demographics, including immigration trends, citizenship, family composition, educa-

tional attainment, labor force participation and other aspects related to changes in the growth and distribution of demographic population groups.

4. I have extensive first hand experience with census enumeration procedures, issues related to the census undercount, dual estimation systems used to determine census undercount, and studies of the census undercount.

5. I am a demographically trained social scientist familiar with sampling theory, including sampling designs, sampling distributions, and sampling error.

6. I am also familiar with redistricting principles. I drafted two separate sets of statewide Congressional, Senate, and Assembly plans which MALDEF submitted to the California Legislature and to the California Supreme Court in *Wilson v. Eu*, 4 Cal. Rptr. 2d 379 (1992). The first set of plans was based on uncorrected 1990 Census data, which had disproportionately undercounted minority populations. The second set of plans was drafted in an attempt to correct the overpopulation of minority districts caused by the 1990 Census differential undercount. I also drafted the Los Angeles County Supervisorial Board remedial redistricting plans, which were adopted by the District Court in *Garza v. Los Angeles County*, 918 F. 2d 763 (9th Cir. 1990), a case in which I also testified as an expert witness. I have also drafted local redistricting plans for smaller jurisdictions, such as the Dinuba School Board and the San Diego City Council.

7. I have served as an expert witness in other cases related to voting rights and redistricting (e.g., *Garza v. Los Angeles County*, *Romero v. City of Pomona*, *Aldasoro v. Imperial County ESD*, *Bonilla v. City of*

*Chicago*, *Benavides v. Eu*), census undercount (e.g., *City of New York v. U.S. Department of Commerce*), and jury pool analysis (e.g., *State of California v. Corona*).

8. In forming the opinions and conclusions contained in this declaration, I have reviewed data, computations, reports, studies, and analyses, including materials prepared for review by the Census 2000 Advisory Committee, as well as the U.S. Department of Commerce, Bureau of the Census, *Report to Congress—The Plan for Census 2000*, originally issued July 1997, revised and reissued August 1997, and the U.S. Department of Commerce, Bureau of the Census, *Census 2000 Operational Plan*, July 1997, and have discussed the Census 2000 Operational Plan with Census Bureau personnel. All of the materials that I relied upon in forming my opinion are of the type reasonably relied upon by experts in the fields of demographic analysis and statistics, and sampling methodology.

9. I have also reviewed the Memorandum for Plaintiff United States House of Representatives in Support of its Motion for Summary Judgment (April 6, 1998).

10. In this declaration, I conclude that: census enumeration is not correctly characterized as a "head count" when one considers the nature of the traditional census methodology; that a complete "head count" is an impossibility; that undercount is unavoidable using traditional census methodology; that sampling is a recognized and valid statistical method; and that, in conjunction with the mail-out, mail-back method, sampling will lead to a more complete and accurate census.



### THE CENSUS IS NOT A HEAD COUNT

11. Traditional census enumeration is not a "head count." More accurately stated, traditional census enumeration is a census of all known addresses. The enumeration procedure relies on a compilation of lists of addresses that are supplemented by addresses discovered through a canvassing process. Traditional census enumeration methodology is almost entirely based on the collection of a census form from every known address, either by mail or by interviewers. The mail-out, mail-back method is address-dependent and implemented by the U.S. Post Office mail carriers. When addresses fail to return their forms, interviewers are sent out to follow-up on those addresses in an effort to obtain census questionnaires from those addresses.

12. Traditional census enumeration is, in fact, an accounting for each address listed. The Census Bureau is typically aware at any given time whether a particular address has or has not returned its census form (or if the address has been determined to be unoccupied), but at no point is it known whether any one person is or is not included in the census. This is so because every census form received can be checked against a secondary data source—the master address list. By contrast, there is no secondary, independent data source to check for the coverage of persons reported. The Census Bureau's goal is to count all persons, but the traditional census methodology does not account for all persons, rather the Census Bureau's traditional census methodology tries to account for a census form from as many occupied addresses as possible.

13. There are a few exceptions to this address-based approach. A limited amount of time is set aside for Service Based Enumeration—enumerating persons who

live in "special places" like marinas, labor camps, etc.—and individual census reports are directly provided to those individuals for them to be counted. Enumeration in special places and such individual reporting comprise a minute portion of the overall population data.

14. The census does not make contact with every person. The Census Bureau accepts as valid information provided by a respondent who reports on others in the household. Should the respondent omit core information, such as age, sex, race and marital status, the census questionnaires will "fail edit", and telephone calls or personal visits are attempted to verify such information. However, if a census form is filled out completely, its information will be accepted at face value.

15. Thus, a census form that totally misrepresents the number or characteristics of persons living at a particular address is accepted as truthful without verification—if no items are omitted or logically inconsistent. Past studies that compare census enumerated households with their responses in the recanvassing, such as in the 1990 Post-Enumeration Survey, indicate that 69.5% of the net coverage errors were caused by mistakes in filling out the census form. (The remaining 30.5% of the coverage error came from failure to enumerate housing units.) (*Plan for the Census 2000*, p. 41)

16. Finally, traditional census enumeration includes inference. For example, in the case of last resort counting which occurs after multiple attempts by interviewers to obtain information directly, the traditional census methodology allows for "persons" as well as inferences about the characteristics of those persons to be as-

signed to households based on secondary sources and characteristics borrowed from a neighboring household. *Plan for Census 2000*, p. 23.

17. The proposed Census 2000 plan provides methodological solutions to the above-described problems that are inherent in the traditional census methodology.

#### UNDERCOUNT IS A CONSISTENT AND UNAVOIDABLE FEATURE OF CENSUS-TAKING

18. Census undercount, measured in different and reliable ways, has not been eradicated despite improved techniques, procedures and technology.

19. Since 1940, one measure of Census undercount was primarily inferential, comparing the census enumeration to birth, death and legal immigration data in demographic analysis. Undercount is the difference between the distribution of enumerated persons by age, gender and race and the estimated number of persons based on these other independent data sources. In the 1980's, undercount estimates were also measured by comparing the results from households enumerated in the census and the Current Population Survey. *Preparing for the 2000 Census, Interim Report I*, National Research Council, Committee on National Statistics, 1997.

20. In the 1990's, undercount estimates became more sophisticated and were measured by comparing census enumerated blocks with independently re-enumerated blocks by the Post-Enumeration Survey (PES). The PES was an independent procedure akin to a "recount" of every household in a sample of over 5,000 blocks selected to represent 116 kinds of neighborhoods. It was designed specifically for the purposes of

adjusting the 1990 census, and over two dozen evaluation studies of the PES confirmed that its quality and implementation met the highest standards. When the PES was compared to the original census enumeration it was possible to determine "person characteristics" of the undercounted, and use this information to adjust the data. For example, a set of characteristics could African American male, 20-29 years of age, unrelated to the head of household. Combining the block characteristics and the person characteristics yielded 1392 possible unique categorizations (referred to as stratum). The strata used for the selected blocks were based on prior knowledge of factors associated with census undercount, including race/ethnicity, gender, urban/rural, central city/suburb, and renter/owner. The Census Bureau was then able to use this information to adjust the flawed data to correct for the known undercount. (The Secretary of commerce later determined not to adopt the adjusted data as the "Official Count.")

21. Multiple studies of census undercount have identified the two sources of undercount error: a) errors in the census procedures; and, b) within household errors, primarily caused by the mis-listing or omission of eligible household members.

22. An address-based enumeration approach can be expected to have difficulties if the master address list is incomplete. According to the PES results following the 1990 Census, 30.5 percent of the net error came from housing units missed by the Census. (*Plan for Census 2000*, p. 41.) In addition, there are errors that arise in counting persons who are not permanently attached to a particular address. Examples of "non-address individuals" include migratory workers, the homeless, movers, and residents of illegally subdivided homes,



retirees living in recreational vehicles, etc. In some cases, persons with addresses seek not to be counted such as probation violators, debtors hiding from creditors, and battered spouses hiding from their partners. Finally, there are the persons who fear discovery by federal authorities, *e.g.*, undocumented immigrants.

23. Despite concerted efforts to inform the public about who is eligible and should be listed as a household resident, errors occur in the listing of household occupants. As noted earlier, 69.5 percent of the net error is attributed to mistaken inclusions or exclusions in enumerated households. For example, it is not atypical for infants, non-related household members, live-in caretakers or family members temporarily working in another city to be omitted. Within-household errors are exacerbated by English language proficiency.

24. Another historically consistent fact is that undercounting is differential, affecting some groups more than others. Every undercount study ever conducted has verified that undercount was more likely for youth, males, African Americans, Hispanics, Asian and Pacific Islanders, Native Americans living on reservations, inner-city dwellers and rural dwellers, and renters.

#### DIFFERENTIAL UNDERCOUNT IN THE 1990 CENSUS

25. Recognizing the persistence of differential undercount, the Census Bureau specifically targeted "hard-to-enumerate" groups with special programs in the 1990 Census. Millions were spent on public education, community outreach, media promotion, and streamlined procedures.

26. After making headway since 1970 in improving the overall undercount as well as in decreasing the gap

in the differential undercount, the 1990 Census retrogressed with a higher overall undercount and increased differential undercount.

Table 1: Percent Net Undercount and Persons Missed in the Census, 1940-1990.

<u>YEAR</u>	<u>% NET UNDERCOUNT</u>	<u>NO. PERSONS MISSED</u>
1940	5.4	7.5 MILLION
1950	4.1	6.5 MILLION
1960	3.1	5.7 MILLION
1970	2.7	5.7 MILLION
1980	1.2	2.8 MILLION
1990	1.8	4.7 MILLION

*Plan for Census 2000*, p. 2.

27. Consistent with past undercount studies, the PES found that undercount was higher for Native Americans (12.2%), Hispanics (5.0%), African Americans (4.4%), than for non-Hispanic whites (0.7%). In addition, urban renters had higher undercount rates (4.2%) than urban homeowners (.09%), and children, who represent 26 percent of the population, accounted for 52 percent of the persons omitted from the 1990 Census.

28. California had the highest numerical and proportional undercount in the 1990 Census, and cities with high minority populations had a disproportionately

higher rate of undercount. For example, Inglewood, California, with a minority population of 93%, had an undercount rate of 10.9%, while Simi Valley, California, with a minority population of 20.3%, had an undercount rate of 3.6%. *An Illustrative Set of Alternative PES Estimates of Under/Over Count Rates for Cities Over 100,000 Population*, Press Release CB91-221, Table 2 (June 13, 1991)

29. The differential impact of undercounting has a direct and severe impact on legislative redistricting, particularly for districts in which large numbers of minorities reside. For example, in California, the 1990 unadjusted census population was 29,760,021. The estimated California population, using the selected PES method, was 30,888,000. This means that the average population for California Assembly Districts using unadjusted population data was 372,000, while the average population using adjusted data was 386,000. Similarly, the difference in population due to the use of undercounted data in 1990 Senate districts was 28,200, and California Congressional Districts were off by 21,692 due to flawed population data. All districts were overpopulated, but because of the differential undercount in geographical areas containing high minority populations, minority districts were the most overpopulated, and in reality represented the highest deviations from the average district size.

#### A FULL-COUNT CENSUS IS NOT A POSSIBILITY USING TRADITIONAL CENSUS METHODS

30. A complete enumeration of the U.S. population using traditional census enumeration methods is not feasible or practical. The traditional census method, relying primarily on address lists and canvassing, re-

sults in in-house under-reporting during the mail-back period, and consistently undercounts certain "hard to count populations." Thus, even if the Census Bureau were able to accomplish a 100% listing of addresses, and receive back forms from every single address, it would still not result in a 100% "head count." Only by returning to a sample of the houses who mailed back forms and performing the thorough and complete "double check," would the Bureau be able to address the inaccuracies caused by in-house misreporting. Therefore, the ICM component of the Census 2000 Plan is the only methodology that can correct for within-household errors, errors that accounted for 69.5% of the net coverage errors in 1990.

31. Attempts to increase outreach in the use of the traditional census methodology will not result in substantial gains in enumeration. Historical evidence and numerous studies confirm the difficulties inherent in census enumeration and the limits of the traditional census methodology.

32. To approach a full-count census, the traditional census methodology must be done in conjunction with sampling, which is the only methodology that can reliably address the errors that prevent a complete and accurate enumeration.

#### SAMPLING IS A RECOGNIZED AND VALID STATISTICAL METHOD WHICH WILL RESULT IN RELIABLE ESTIMATES

33. Sampling is a common and accepted statistical method relied upon by social scientists, researchers, quality control specialists, farm owners, opinion pollsters, and other scientists and technicians. The question is not whether sampling is a proper statistical



method, but rather whether it is appropriate in conjunction with traditional methods for census enumeration.

34. The concept of sampling is based on an understanding of sampling distributions—normally, bell-shaped curves—that describe the possibility that any one sample will properly reflect that population from which it is taken. Sampling distributions also provide the basis for determining confidence limits around a sample estimate.

35. In general, the larger the sample, the more likely that sample will reflect the population from which it is drawn. For that reason, election polls based on several thousand respondents to reflect the opinions of the 100 million U.S. voting population have substantial standard errors. Despite the fact that the thousand or so respondents to a poll represent an infinitesimal proportion of all voters, the standard error is typically plus or minus 5 percent.

36. The sample designs that are proposed to be used in conjunction with traditional census methodology in Census 2000 represent exceedingly large sample proportions. For example, should 80 percent of occupied households in a census tract respond by mail, follow-up interviewers will interview half (50%) of all non-responding households to estimate the remaining households. Should 85 percent of the occupied households in a census tract respond to the census by mail, follow-up interviewers will interview one-third (33%) of all remaining non-respondent households before estimating the remaining households. Either of the samples illustrated above is substantially larger—and thus, more representative—than the proportion sampled in the vast majority of sample surveys. No matter how

large the percentage of mail-back responses is, the Census Bureau will always interview a minimum of 1 in every 3 non-responding households in each census tract. *Census 2000 Decision Memorandum, No. 34* (January 2, 1998)

37. When one considers that the Census Bureau estimates, on the average, that 67 to 70 percent of households will mail-back their census form, in the vast majority of cases, the final 10 percent of nonresponding households in a census tract will be estimated from interviewing 2 of every 3, or 66 percent of the persons in the pool of non-responding households. This sample proportion is more than sufficiently large and representative to provide highly reliable estimates.

38. Sampling error is known and understood and can transparently be taken into account by decision makers. In general, knowing the degree of error of a sample estimate allows decision makers who are using the data to ascertain a sample estimate's precision. For the purposes of understanding the quality and having confidence in the data, a known sampling error is far better than not knowing the extent of error around a census "head count."

39. Sampling will be used in conjunction with traditional census enumeration procedures. First, 90% of the households will be surveyed, by mail or by interview. These follow-up interviews, which will take place with at least 1 in 3 households who do not mail back forms, will be used to estimate the remaining 10% in each Census tract during the initial phase of the Census. In making those estimations, the households that fail to respond by mail are not assumed to be alike. Sampling methodology identifies characteristics of a representative sample, and imputes those characteris-

tics to a larger population. Thus, in the post mail-back period, non-responding households are assumed to be part of a subgroup of households that can be identified through representative sampling. Non-responders are more likely to share characteristics with fellow non-responders than with those who mailed back their form.

40. Past experience indicates that the mail-back response period followed by canvassing by Census enumerators can attain 90 percent coverage for every census tract. The 90 percent threshold is a reasonable attainable goal whose level is consistent with complementary evaluative programs, *i.e.*, the Integrated Coverage Measurement (ICM).

41. Additional sampling will take place during the second phase of the Census that will involve interviews of a random population sample of approximately 750,000 housing units in blocks selected to reflect all racial and ethnic groups, and all sizes of towns and rural areas from all areas of each state. This is an evaluative program that will inform the Bureau what proportion of the people in each sample block was omitted from the original count, either through in-house reporting errors or because entire housing units were missed. If persons in a block were missed, they will be added to the count. Deductions from the census enumeration would only occur in the case of literal duplication of people or residences, and estimations made during the initial phase may be reduced upon a finding of a net overcount in a particular area, *i.e.*, in an area where the overcount exceeds the undercount.

42. The use of sampling in Census 2000 will produce more accurate data at the National level, the State level, the Congressional District level, and the census tract level. The estimated error rates for each of those

levels will be lower than the error rate that will result without the use of sampling. *Plan for Census 2000*, pp. 44-45.

43. Sampling is a well established method known and used by many researchers. All decisions related to the sampling process can be evaluated. The Census Bureau has stated that it will make public any formula used for the estimation, calculations of standard errors and confidence limits as well as the sample sizes. Individual statisticians are capable of verifying the results and the assumptions for each step of the process. The transparency of the sampling process is its best protection against the possibility of manipulation. *Plan for Census 2000*, pp. 49-51.

44. In sum, sampling corrects for the historical inaccuracies related to coverage of households and persons within households. The Integrated Coverage Measurement will correct for mistakes within enumerated households and provide information on nonsampling error caused by census procedures. The Census 2000 Plan will provide more accurate and complete data that will reduce, if not eliminate, the differential undercount of past Censuses.

I declare under penalty of perjury that the foregoing is true and correct. If called upon to do so, I could and would so testify. Executed this 30 day of April, 1998, in Washington D.C.

/s/ LEOBARDO F. ESTRADA  
Dr. LEOBARDO F. ESTRADA



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## EDUCATIONAL BACKGROUND:

Florida State University, Ph.D Sociology/Demography,  
 August, 1970

Florida State University, M.S., Sociology,  
 December, 1968

Baylor University, B.A., Sociology, June, 1966

## RELEVANT SKILLS:

Social research methodology, data reduction and data  
 analysis, demographic analysis, social policy research,  
 redistricting methodologies.

## SPECIAL AREAS OF INTEREST:

Demography and Urbanization, Statistics and Research  
 Methods, Hispanic Population of the U.S., Inner City  
 Urban Planning, Hispanic market research.

## PROFESSIONAL POSITIONS:

Director, North American Integration and  
 Development Center, School of Public Policy and  
 Social Research, University of California at Los  
 Angeles (1995 to present)

Associate Professor of Urban Planning, School of Public  
 Policy and Social Research, UCLA (1977 to present)  
 Senior Consultant, Diversified Data Systems, Inc.  
 (1994 to present)

Senior Vice President for Research,  
 NuStats, International (1990 to 1995)  
 Senior Scholar, The Tomas Rivera Center,  
 Claremont, CA (1985-91)

## PREVIOUS WORK EXPERIENCE:

Staff Assistant to the Deputy Director, U.S. Bureau of  
 the Census, Washington, D.C. (9/79-12/80).

Visiting Associate Research Scientist, Institute for  
 Social Research, University of Michigan, Ann Arbor,  
 MI (Summer 1977-79, 82).

Special Assistant to the Division Chief, Population  
 Division, U.S. Bureau of the Census,  
 Washington, D.C. (8/75-8/77).

Associate Professor, Department of Sociology and  
 Anthropology, North Texas State University,  
 Denton, TX (9/70-7/77).

## BOOKS AND MONOGRAPHS:

*Individuals in Society: A Modern Introduction to  
 Sociology*, with James A. Kitchens, Charles Merrill  
 and Company, 1973.

*Cuantos Somos: A Demographic Study of the Mexican  
 American Population*, with Teller, Hernandez and  
 Alvirez, Mexican-American Studies Center,  
 University of Texas, Austin, TX, 1977.

*The Changing Profile of Mexican-America: A Source-  
 book for Policy Makers*, Tomas Rivera Center,  
 Claremont, CA, 1986.

*Tidal Wave II: An Evaluation of Enrollment  
 Projections for California Higher Education*, with  
 David Breneman and Gerald Hayward, Technical

Report #95-6, The California Higher Education Policy Center, September, 1995.

ARTICLES IN PROFESSIONAL JOURNALS AND BOOKS:

- "Census Data and the Problems of Conceptually Defining the Mexican-American Population," with Jose Hernandez and David Alvirez. *Social Science Quarterly*, Vol. 52, March 1973, pp. 671-687.
- "A Comparison of the Mexican Population in the Midwest and Southwest," *Aztlan*, Vol. 7. No. 2, 1978.
- "Language and Political Consciousness Among the Spanish-speaking in the United States: A Demographic Study," *Bilingualism and Language Policy in the U.S.*, Center for Policy Studies, University of Chicago, 79.
- "The Responsibility to Know and the Ability to Understand: Policy-making with Hispanic Perspectives," *METAS*, Vol. 1, No. 3, Fall, 1980.
- "Chicanos in the U.S.: A History of Exploitation and Resistance," with Maldonado, Macias and Garcia, *DAEDALUS*, Vol. 110., No. 2, Spring, 1981. Reprinted in *Majority and Minority*, N.R. Yetman (ed.), 5th Edition, Boston, MA, Allyn and Bacon, 1985, pp. 162-82.
- "Research on the Magnitude of Mexican Undocumented Immigration to the U.S.: A Summary," with Manuel Garcia y Griego, *Mexican Immigrant Workers in the U.S.*, A. Rios-Bustamante (ed.), Chicano Studies Research Center, U.C.L.A., 1981.
- "The Importance of Demographic Data for Information Providers: An Illustration of the Latino Population," in F. Garcia-Ayvens and R. Chabran (eds.), *Biblio-Politica*, Chicano Studies Library

Publications, University of California, Berkeley, 1984.

- "The Extent of Spanish/English Bilingualism and Language Loyalty in the U.S.," *Aztlan*, Vol. 15, No. 2, Fall, 1985, pp. 379-392.
- "Dynamics of Hispanic Populations," *Social Thought*, Vol. 11, No. 3, Summer, 1985, pp. 23-39.
- "Los Angeles Neighborhoods: Organization and Conflict," in J. Dimento, I. Graymer and F. Schnidman (eds.), *The Urban Caldron*, Oelgeschlager, Gunn, and Hain/Lincoln Institute of Land Policy, Boston, 1986, pp. 99-102.
- "Hispanics," in Rosen, et al. (eds.), *Encyclopedia of Social Work*, National Association of Social Workers, Silver Spring, MD, 1987, pp. 732-39.
- "Mortality Research on Hispanics: Challenges and Opportunities," *Proceedings of the 1987 Public Health Conference on Records and Statistics*, U.S. GPO, Washington, D.C., 1988.
- "Economic Development Policy Analysis," in H. Romo (ed.), *Latinos and Blacks in the Cities*, The LBJ Library and the LBJ School of Public Affairs, Austin, TX, 1990, pp. 107-111.
- "Survival Profiles on Latino Nonprofit Organizations," in H. Gallegos and M. O'Neil (eds.), *Hispanics and the Nonprofit Sector*, The Foundation Center, New York, NY, 1991, pp. 127-138.
- "Ethnic Self-Identification and Labeling," in G.P. Knight and M. Bernal (eds.), *Ethnic Identification*, University of Arizona, Tucson, 1992.



- "Deficiencies of Hispanic Data for Public Health Planning," with J. Delgado, *Public Health Reports*, May, 1993.
- "Mending the Politics of Division in Post-Rebellion L.A.," with S. Sensiper in A.J. Scott and E.R. Brown, (eds.), *South Central Los Angeles: Anatomy of an Urban Crisis*, Working Paper No. 6, Lewis Center for Regional Policy Studies, U.C.L.A., June, 1993.
- "The Politics of the Census: A Reflection of the Dilemmas in U.S. Society," *Proceedings of the Joint Canada-United States Conference on Measurement of Ethnicity*, GPO, Washington, D.C., September, 1993.
- "The Dynamic Demographic Mosaic Called America: Implications for Education," *Education and Urban Society*, Vol. 25, No. 3. May, 1993.
- "Immigration Issues and Policy in California," in Institute of Governmental Studies, University of California Berkeley, (forthcoming).

#### OTHER PUBLICATIONS:

- "Racial/Ethnic Classifications in U.S. Censuses," *Intercom: The International Newsletter on Population*, Vol. 4, November 11 (1976).
- "Spanish Heritage Classification in U.S. Censuses," *Intercom*, Vol. 4, No. 12 (12/76).
- "Senior Programs: Growth or Decline in the Next Five Years," *Somos*, Vol. 1, No. 5, (10/78).
- "Review and Analysis of Hispanic Youth Employment Data Collection Systems and Reporting Methods," *Hispanic Youth Employment: Establishing a Knowledge Base*, National Council de la Raza, Washington, D.C. (10/79).

- "Demography, Declining Enrollment and the 1980 Census," *Desegregation: Integration*, Report of the 18th Annual NEA Conference on Human and Civil Rights in Education, Washington, DC, 1980.
- "Hispanic Realities of the Eighties," *Foundation News*, 1981.
- "Demographic Studies on Chicanos," *La Red*, No. 54, (6/82).
- "The Significance of the 1980 Census for Latinos," *Caminos*, (10/82).
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- "The Latinization of the U.S.," *Our Barrio Past, Present, and Future*, Chicano Architecture Students Association, University of California, Berkeley, 1983.
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- "Hispanic Transit Dependent Populations," *American Planning Division Newsletter*, Vol. 8, No. 3, (7/86), pp. 10-14.
- "Understanding Demographics: the Case of Hispanics in the U.S." in L.B. Brown, J. Oliver and J.J. Klor de Alva (eds.), *Sociocultural and Service Needs in Working with Hispanic-American Clients*, School of Social Welfare/Nelson A. Rockefeller College of Public Affairs and Policy, State University of New York at Albany, 1985.
- "Mexican Immigration?" *California Tomorrow*, Vol. 1, No. 1, Summer 1986, pp. 22-27.

- "Critique of Migrant Farmworkers: Numbers and Distribution" by Martin and Holt, with D. Villarejo and P. Barnett, California Rural Legal Aid Foundation (5/87).
- "Anticipating the Demographic Future," *Change* (5/88), pp. 14-19.
- "Communities in Transition: South Bay Cities and The Northern Valleys," Southern California Gas Company, 1988.
- "The Demographics, of California's Latinos: Maps and Statistics," Rose Institute, Claremont McKenna College, Claremont, CA, 1988.
- "Comunidades Hispanas en los Estados Unidos," in M. Ramirez, et al. (eds.), *Latinos in the Making of the U.S. Yesterday, Today and Tomorrow*, N.Y. State Department of Education, 1989.
- "Hispanic America: Recent Trends," *Oxford Analytica*, Oxford, U.K, No. 23 (10/89).
- "A Survey of Latino Leadership's Concerns and Needs," Tomas Rivera Center, Claremont, CA, 1990.
- "A Latino Community Survey to Identify Latino Concerns and Needs," Tomas Rivera Center, Claremont, CA, 1990.
- "Hispanic Evolution," *Foundation News*, Vol. 31, No. 3 (6/90).
- "Labor Market Prospects for a Diverse Los Angeles," *Los Angeles Economic State of the City, 1991*, L.A. City Council, Community and Economic Committee (1/91).

# RESEARCH PRESENTATIONS AT PROFESSIONAL MEETINGS SINCE 1985:

- 45th Congreso Internacional de Americanistas, Bogota, Colombia (7/19/85).
- American Planning Association, Los Angeles, CA (4/6/86)
- Sociology of Education Conference, Asilomar, CA (2/14/86).
- National Education Association, Louisville, KY (6/28/86).
- California Post-Secondary Education Commission, Asilomar, CA (7/21/86).
- Texas State Department of Aging Annual Conference, (9/3/86).
- California State University, Los Angeles, CA (1/29/87)
- Council on Foundations, Atlanta, GE (3/30/87)
- American Association of Higher Education, Chicago, IL (3/4/87)
- Binational Conference on Health, Guadalajara, Mexico (11/12/87)
- Conference on Achievement for Minority Students, Los Angeles (11/16/87)
- California Association of Community Colleges, Santa Clara, CA (11/21/87)
- Western Interstate Coalition for Higher Education, Phoenix, AZ (11/22/87)
- Santa Barbara City College (3/15/88)
- Seminario Internacional Sobre Regionalismo y Desarrollo, Punta Arenas, Chile (3/24/88)
- Los Rios Community Colleges, Sacramento, CA (4/6/88)
- Conference on Family Influences on Mexican-American Acculturation, Tempe, AZ (4/28/88)



Comparative Ethnicity Conference, UCLA,  
Los Angeles, CA (6/2/88)  
XVI Congreso Interamericano de Planificacion,  
San Juan, PR (8/23/88).  
American Planning Association,  
Palm Springs, CA (10/24/88).  
Annual Conference of Ford Foundation Doctoral  
Minority Fellows, National Research Council,  
Washington, DC (11/3/88)  
Conference on the Future of Latino Non-Profit  
Organizations, San Francisco, CA (11/14/88)  
Community Planning and Action Project,  
Rockefeller Foundations,  
San Antonio, TX (1/19/89)  
University of North Texas,  
Denton, TX (9/29/89)  
San Diego State University,  
San Diego, CA (11/28/89)  
Texas Lyceum Conference,  
Austin, TX (1/26/90)  
Cross Cultural Colloquium Series, American  
University, Washington, DC (1/30/90)  
Cabrillo College,  
Watsonville, CA (2/1/90)  
University of Colorado,  
Boulder, CO (2/7/90)  
LBJ School of Public Affairs,  
Austin, TX (2/11/90)  
Corpus Christi State University,  
Corpus Christi, TX (4/6/90)  
University of Northern Colorado,  
Greeley, CO (4/28/90)  
Population Association of America,  
Toronto, Canada (5/3/90)

Austin Fund Lecture, Wayne State University,  
Detroit, MI (6/4/90)  
Institute for Regional Studies of the Californias,  
Tijuana, BC (7/29/90)  
American Statistical Association,  
Anaheim, CA (8/6/90)  
Whittier College,  
Whittier, CA (10/3/90)  
Rutgers University,  
Camden, NJ (10/22/90)  
Rural Sociological Society,  
Norfolk, VA (1/15/91)  
University of California at San Diego,  
La Jolla, CA (2/28/91)  
Western Governmental Research Association,  
Anaheim, CA (4/9/91)  
Community and Public Issues Council of Conference  
Board, Los Angeles, CA (10/2/91)  
Academy of Justice,  
San Diego, CA (10/2/91)  
California Board of Corrections,  
Redding, CA (10/6/91)  
University of Southern California,  
Los Angeles, CA (10/24/91)  
Newspaper Research Council,  
Dallas, TX (11/11/91)  
Hospital Council of Southern California,  
Pasadena, CA (12/10/91)  
League of California Cities,  
Monterrey, CA (2/10/92)  
California Probation, Parole and Correctional  
Association, San Diego, CA (6/13/92)  
Center for U.S.-Mexican Studies, University of  
California, San Diego, CA (6/23/92)

Surgeon General's National Workshop on  
 Hispanic/Latino Health, Washington, DC (9/29/92)  
 Oldenborg Center for International Relations,  
 Pomona College, Claremont, CA (10/2/92)  
 Chicano/Latino Intersegmental Convocation,  
 Los Angeles, CA (11/16/92)  
 Texas A&M University,  
 College Station, TX (12/10/92)  
 University of Texas at San Antonio,  
 San Antonio, TX (2/26/93)  
 U.C.L.A. School of Law,  
 Los Angeles, CA (2/6/93)  
 Centers for Disease Control,  
 Atlanta, GE (3/1/93)  
 Bet Gabriel International Symposium,  
 Tiberius, Israel (5/5/93)  
 Commission on Security and Cooperation in Europe,  
 Warsaw, Poland (5/25/93)  
 Public Telecommunications Financial Management  
 Association, Palm Springs, CA (6/2/93)  
 Sociology of Education Annual Meeting,  
 Asilomar, CA (2/3/95)  
 National Association of Child Care Referral Agencies,  
 Washington, D.C. (2/24/95)  
 National Association of Area Agencies on Aging,  
 Los Angeles, CA (7/25/95)  
 Independent Sector Annual Meeting,  
 Boston, MA (10/23/95)

# CURRENT MEMBERSHIP IN PROFESSIONAL ORGANIZATIONS:

American Sociological Association  
 American Statistical Association  
 Population Association of America  
 Association of Borderland Scholars  
 American Public Health Association  
 Rural Sociological Association  
 American Association of Schools in Planning  
 American Planning Association

# PRESENTATIONS TO COMMUNITY GROUPS AND ORGANIZATIONS SINCE 1985:

National Association of Latino Elected and  
 Appointed Officials, Washington, DC (11/22/85)  
 California Association of Principals,  
 Los Angeles, CA (11/21/85)  
 Santa Monica College Associates (6/16/86)  
 Raza Administrators and Counselors in Higher  
 Education, Fresno, CA (10/1/86)  
 California Coalition for Public Education,  
 Los Angeles, CA (10/10/86)  
 Kern County Chamber of Commerce,  
 Bakersfield, CA (11/14/86)  
 California Teachers Association,  
 Palm Desert, CA (2/10/87)  
 Mexican American Opportunities Foundation,  
 Los Angeles, CA (2/27/87)  
 California State Senate Subcommittee on Family  
 Policy,  
 San Francisco, CA (3/21/87)  
 Coalition on Economic Development,  
 Los Angeles, CA (4/21/87)  
 University of California Board of Regents,  
 San Diego, CA (6/18/87)



Midwest Voter Registration and Education Project,  
Chicago, IL (6/26/87)  
International City Association,  
Rancho Bernardo, CA (6/10/87)  
Subcommittee on Census and Population, U.S.  
Congress, Washington, D.C. (7/14/87)  
National Conference of Christians and Jews,  
Pomona, CA (10/28/87)  
Texas Coordinating Board on Higher Education,  
Austin, TX (4/5/88)  
Adopt-a-School Appreciation Breakfast, LAUSD,  
Los Angeles, CA (4/13/88)  
Child Welfare League of America,  
Pasadena, CA (4/13/88)  
California Community College Board of Governors,  
Palm Springs, CA (4/16/88)  
Council on Foundations,  
Los Angeles, CA (3/25/88)  
California Association of Correction Officers,  
Irvine, CA (6/19/88)  
Command College, California State Department of  
Justice, Pomona, CA (7/14/88)  
National Education Association,  
New Orleans, LA (6/29/88)  
Southern California Society of Consumer Affairs  
Officers, Los Angeles, CA (8/18/88)  
American Association of School Administrators,  
Washington, DC (9/14/88)  
Local Government Commission,  
Lake Arrowhead, CA 9/16/88)  
La Ley (Association of Hispanic Enforcement and  
Probation Officers), Pasadena, CA (10/13/88)  
Sacramento County Office of Education,  
Sacramento, CA (12/6/88)

National Association of Hispanic Publishers,  
Las Vegas, CA (1/11/89)  
Ethnic Market Dynamics,  
San Diego, CA (9/12/91)  
Department of Public Works Management Action  
Committee, Los Angeles, CA (6/28/92)  
National Community College Hispanic Council  
Leadership Seminar, Flagstaff, AZ (6/92)  
National Lawyer's Guild,  
Los Angeles, CA (9/10/92)  
Protection and Advocacy, Inc.,  
Glendale, CA (11/4/92)  
LAUSD's Senior High School Principals,  
Los Angeles, CA (10/21/93)  
Daniel Freeman Hospital,  
Palm Springs, CA (10/4/93)  
Cambridge College Board of Trustees,  
White Plains, NY (9/95)

ADVISORY BOARD MEMBERSHIPS:

Census Advisory Committee on Populations Statistics,  
US Bureau of the Census, Washington, DC (1973-75)  
Board of Directors, Asociacion Nacional Pro Personas  
Mayores, Los Angeles, CA (1978- )  
Panel on Decennial Census Plans, Committee on  
National Statistics, National Research Council,  
Washington, DC (1978)  
Panel on Work, Family and Community, Committee on  
Child Development, National Research Council,  
Washington, DC (1978-81)  
National Institute of Education, Desegregation Studies  
Group, Washington, DC (1980-82)  
Delegate, White House Conference on Aging,  
Washington, DC (Nov.-Dec., 1981)

National Committee for Research on the 1980 Census,  
Social Science Research Council, New York, NY  
(1981-1983)

Advisory Board on Immigration Issues, Urban  
Institute, Washington, DC (1983)

Advisory Panel on Language Minority Children,  
Educational Testing Service, Princeton, NJ (1984-85)

Advisory Board of the Southern California Social  
Survey, Institute for Social Research, UCLA,  
Los Angeles, CA (1984)

Subgroup to Evaluate the U.S. Standard Certificate of  
Life Birth, U.S. National Center for Health  
Statistics, Washington, DC (1984-1986)

Advisory Board, Committee for Public Policy Research  
on Contemporary Hispanic Issues, Inter-University  
Program for Latino Research/Social Science  
Research Council, Austin, TX (1985-88)

Advisory Board, Latino Naturalization Project,  
National Association of Latino Elected and  
Appointed Officials, Washington, DC (1985-88)

Advisory Board, Non-Voter Study, Committee for the  
Study of the American Electorate, Washington, DC  
(1985-86)

Hispanic Advisory Committee on the 1990 Census,  
U.S. Bureau of the Census,  
Washington, DC (1986-90)

Advisory Committee, Economic Development in  
Southern California, Southern California Association  
of Governments, Los Angeles, CA (1987)

Panel on Rural Economic Development, Aspen  
Institute/Ford Foundation, Washington, DC (1987-  
91)

Board Member, LA 2000 Partnership,  
Los Angeles, CA (1988- )

Board of Directors, El Pueblo Community  
Development Corporation, Los Angeles, CA (1987- )

Broadcast Advisory Council, Hallmark, Inc.,  
Kansas City, MO (1987-91)

Advisory Board, California Policy Seminar,  
Berkeley, CA (1988- )

Board Member, Latino Issues Forum,  
San Francisco, CA (1989-93)

Special Advisory Panel on the 1990 Census  
Adjustment, Office of the Secretary, U.S.  
Department of Commerce, Washington, DC (1989-91)

Board of Directors, Broadway Stores, Inc. (1992-1995)

Advisory Board on Transportation Statistics, Bureau of  
Transportation Statistics, Washington, D.C. (1995- )

EXAMPLES OF LEGAL EXPERT CONSULTANTSHIPS

*Romero v. City of Pomona, CA*

*State of California v. Corona*

*Garza v. County of Los Angeles, CA*

*Reyes v. Dinuba Unified School District, CA*

*Aldasoro v. City of El Centro, CA*

*Valadez v. City of Santa Maria, CA*

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### ASSESSMENT OF ACCURACY OF ADJUSTED VERSUS UNADJUSTED 1990 CENSUS BASE FOR USE IN INTERCENSAL ESTIMATES

#### REPORT OF THE COMMITTEE ON ADJUSTMENT OF POSTCENSAL ESTIMATES BUREAU OF THE CENSUS DEPARTMENT OF COMMERCE AUGUST 7, 1992

\*\*\*

#### Estimated Undercount

Population Group	June 1991		July 1992	
	Undercount Estimate	Sampling Error	Undercount Estimate	Sampling Error
U.S. Total	2.08%	.18%	1.58%	.19%
Black	4.82	.29	4.43	.51
Asian and Pacific Islander	3.08	.47	2.33	1.35

438

American Indian, Eskimo, or Aleut	4.77	1.04	4.52	1.22
Hispanic (Can be of any race)	5.24	.42	4.96	.73

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No. 98-404

Supreme Court, U.S.  
**FILED**

OCT 5 1998

OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1998

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UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
APPELLANTS

*v.*

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**BRIEF FOR THE APPELLANTS**

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## QUESTIONS PRESENTED

1. Whether the instant case, which involves a suit filed by the United States House of Representatives challenging the Secretary of Commerce's current plan for the year 2000 census, presents a justiciable controversy satisfying the requirements of Article III of the Constitution.

2. Whether the Census Act, 13 U.S.C. 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

3. Whether the Census Clause of the Constitution, Article I, Section 2, Clause 3, which requires Congress to conduct an "actual Enumeration" of the population, prohibits the use of statistical sampling in determining the population for the purpose of apportioning Representatives among the States.



## II

### PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census. The United States House of Representatives was the plaintiff in the district court and is an appellee in this Court. The following were intervenor-defendants in the district court: Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M. Slaughter; Bennie G. Thompson; Carolyn Maloney; Christopher Shays; Tom Sawyer; Rod Blagojevich; Bobby Rush; Luis Guitierrez; John Conyers, Jose Seerano; Cynthia McKinney; Charles Rangel; Donald Payne; Howard Berman; Xavier Beccera; Loretta Sanchez; Julian Dixon; Henry Waxman; Maxine Waters; Esteban Torres; Sheila Jackson Lee; Legislature of the State of California; The California Senate; John Burton, individually and as President Pro Tempore of the California Senate; Antonio Villaraigosa, individually and as Speaker of the California Assembly; City of Los Angeles, California; City of New York, New York; County of Los Angeles, California; City of Chicago, Illinois; City and County of San Francisco, California; Miami-Dade County, Florida; City of Inglewood, California; City of Houston, Texas; City of San Antonio, Texas; City and County of Denver, Colorado; City of Cudahy, California; City of Long Beach, California; City of San Bernardino, California; City of Detroit, Michigan; City of Bell, California; City of Huntington Park, California; City of San Jose, California; City of Stamford, Connecticut; City of Oakland, California; County of Santa Clara, California; County of San Bernardino, California; County of Alameda, California; County of Riverside, California; State of New Mexico; National Korean American Service & Education

## III

Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California, Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim; Adeline M.L. Yoong; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra; U.S. Conference of Mayors; League of Women Voters of Los Angeles; Robert Menendez; Ed Pastor; Silvestre Reyes; Ciro Rodriguez; and Carlos Romero-Barcelo. Pursuant to Rule 18.2 of the Rules of this Court, they are deemed parties in this Court.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1998

No. 98-404

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
APPELLANTS

*v.*

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA*

**BRIEF FOR THE APPELLANTS**

**OPINION BELOW**

The opinion of the district court (J.S. App. 1a-67a) is not yet reported.

**JURISDICTION**

The judgment of the district court (J.S. App. 66a-67a) was entered on August 24, 1998. A notice of appeal (J.S. App. 68a-69a) was filed on August 25, 1998, and the jurisdictional statement was filed on September 4, 1998. The Court noted probable jurisdiction on September 10, 1998. J.A. 33. The jurisdiction of this Court rests on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482.

**CONSTITUTIONAL AND STATUTORY PROVISIONS  
INVOLVED**

The following constitutional and statutory provisions are reproduced as an appendix to this brief: Article I, Section 2, Clause 3 of the United States Constitution; Section 2 of the Fourteenth Amendment; 2 U.S.C. 2a; 13 U.S.C. 141 and 195;

and Section 209 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2480-2483.

### STATEMENT

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives \* \* \* shall be apportioned among the several States \* \* \* according to their respective Numbers" (the Apportionment Clause). It further provides that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct" (the Census Clause). *Ibid.* See also U.S. Const. Amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

2. The Census Act provides that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. 141(a). The "tabulation of total population by States" is to be completed and reported by the Secretary to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Congress has also established the mechanism to be used in apportioning Representatives among the States after the census has been completed. Within one week after the beginning of the first Session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State \* \* \* and the number of Representatives to which each State would be entitled" under the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United*

*States Dep't of Commerce v. Montana*, 503 U.S. 442, 451-455 (1992). Under the apportionment law, "[e]ach State shall be entitled \* \* \* to the number of Representatives shown in the statement" submitted by the President. 2 U.S.C. 2a(b) (Supp. II 1996). Within 15 days after receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." *Ibid.*<sup>1</sup>

The Census Act authorizes the Secretary to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). The Bureau of the Census and its Director assist the Secretary in the performance of his duties under the Census Act. See 13 U.S.C. 2, 21. The Act further states that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195.

3. Each of the decennial censuses conducted in the United States is believed to have undercounted the country's actual population. *Wisconsin v. City of New York*, 517

<sup>1</sup> Until 1941, Congress's typical practice was to enact a new law each decade in order to reapportion Representatives among the States on the basis of the decennial census. The legislative debates over those apportionment laws frequently engendered disputes concerning the mathematical formula that should be used in determining the number of Representatives to be allotted to each State. See generally 91-860 Gov't Br. at 5-10 (*Montana*). Indeed, Congress failed to pass any reapportionment law at all after the 1920 census. *Montana*, 503 U.S. at 451. By the Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761-762, 2 U.S.C. 2a, Congress established the "method of equal proportions" as the formula to be used in the apportionment process. *Montana*, 503 U.S. at 451-452 & n.25. "That Act also made the reapportionment process self-executing, eliminating the need for Congress to enact an apportionment Act after each decennial census." *Id.* at 452 n.25; see also *Franklin v. Massachusetts*, 505 U.S. 788, 791-792 (1992).



U.S. 1, 6 (1996). The 1970, 1980, and 1990 censuses are estimated to have undercounted the population by 2.7%, 1.2%, and 1.6%, respectively. *Id.* at 6-7, 20. The Census Bureau has also concluded that members of certain demographic groups—including children under 18, renters (particularly in rural areas), and members of racial and ethnic minorities—are more likely to be missed in the census than are other persons, a phenomenon known as a “differential undercount.” See Bureau of the Census, U.S. Dep’t of Commerce, *Report to Congress—The Plan for Census 2000*, at 2-3 (Aug. 1997) (*Report to Congress or Report*) (J.A. 48-49); *City of New York*, 517 U.S. at 7; J.S. App. 3a-4a.

In preparing for the 1990 census, the Commerce Department devoted extensive consideration to the possibility of using statistical sampling to address the undercount and differential undercount. The methodology considered by the Department involved an intensive postenumeration survey (PES) of particular representative geographical areas. By comparing the data obtained from the PES with the “raw” census figures for the same geographical areas, and by extrapolating the results of that comparison across the country as a whole, the Department produced adjusted census figures for each of the States and their political subdivisions. See *City of New York*, 517 U.S. at 8-10. For a variety of reasons, however, the Secretary ultimately determined that the unadjusted rather than the adjusted counts should be used as the official census figures. See *id.* at 10-12; 56 Fed. Reg. 33,582 (1991).<sup>2</sup> This Court upheld that decision against constitutional challenge. See *City of New York*, 517 U.S. at 24.

<sup>2</sup> In explaining his decision against adjustment of the 1990 census figures, the Secretary did not take the position that an adjustment would violate either the Constitution or the Census Act. To the contrary, he stated that “[w]hile not free from doubt, it appears that the Constitution might permit a statistical adjustment, but only if it would assure an accurate population count,” 56 Fed. Reg. at 33,605; and he observed that “[w]hile judicial opinion is unsettled on the question \* \* \*, the majority

4. Shortly after the Secretary decided against adjustment of the 1990 census figures, Congress passed the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (13 U.S.C. 141 note). The Act directed the Secretary to contract with the National Academy of Sciences to study “means by which the Government could achieve the most accurate population count possible.” § 2(a)(1), 105 Stat. 635. The Academy was instructed to consider, *inter alia*, “the appropriateness of using sampling methods, in combination with basic data-collection techniques or otherwise, in the acquisition or refinement of population data, including a review of the accuracy of the data for different levels of geography (such as States, places, census tracts and census blocks).” § 2(b)(1)(C), 105 Stat. 635. The Academy established three panels, all of which “concluded that traditional census methods needed to be modified in response to societal changes, and that statistical sampling techniques would both increase the census’ accuracy and lower its cost.” J.S. App. 4a.

In 1997, Congress passed a bill that would have amended 13 U.S.C. 141(a) to provide that, “[n]otwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in [C]ongress among the several States.” H.R. 1469, 105th Cong., 1st Sess., Tit. VIII(b)(1), at 65 (1997). The President vetoed that bill. See Message to the House of Representatives Returning Without Approval Emergency Supplemental Appropriations Legislation, 33 Weekly Comp. Pres. Doc. 846 (June 9, 1997) (veto message). The President’s veto message explained that he regarded the sampling prohibition as objectionable because

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of courts considering this issue have ruled that [13 U.S.C. 195] permits an adjustment if the adjustment method makes the census more accurate,” *id.* at 33,606.

"[w]ithout sampling, the cost of the decennial census will increase as its accuracy, especially with regard to minorities and groups that are traditionally undercounted, decreases substantially." *Id.* at 847. Shortly thereafter, Congress passed a law directing the Department of Commerce "within thirty days of enactment of this Act to provide to the Congress a comprehensive and detailed plan outlining its proposed methodologies for conducting the 2000 decennial Census and available methods to conduct an actual enumeration of the population." Emergency Supplemental Appropriations Act for Recovery From Natural Disasters, and for Overseas Peacekeeping Efforts, Including Those in Bosnia, Pub. L. No. 105-18, Tit. VIII, 111 Stat. 217.

5. Pursuant to that statutory directive, the Department of Commerce forwarded the *Report to Congress*, which set forth the methods by which it plans to conduct the 2000 census. J.A. 34-147. The *Report* described a variety of new mechanisms that the Census Bureau intends to use in order to improve its ability to obtain responses from individual residents in the initial phase of the census. J.A. 73-80. It explained, for example, the Bureau's plan to develop a new Master Address File superior to the address list used in the 1990 census. *Ibid.* It described new outreach methods, including plans to make census forms available in public places such as malls, stores, and schools; and increased availability of forms in languages other than English. J.A. 77-79. The *Report* also explained the Census Bureau's plan to introduce new technologies designed to detect and eliminate multiple responses from the same household, thereby ensuring that the increased availability of census forms will not lead to overcounting of persons identified on more than one questionnaire. J.A. 79.

The *Report to Congress* explained, however, that such techniques alone would not be sufficient to obtain the most accurate population counts feasible. The *Report* therefore confirmed the Census Bureau's intention to make use of sta-

tistical sampling techniques that the Bureau had concluded would increase the accuracy of the 2000 census while reducing its cost. See J.A. 81-98. The Bureau's determination that the use of sampling was warranted was based to a significant degree on the results of the 1990 census. The *Report* observed that "[f]or the first time since the Census Bureau began conducting post-census evaluations in 1940, the [1990] decennial census was *less* accurate than its predecessor." J.A. 48.

That decline in accuracy, the *Report* emphasized, was not the result of either a lack of funding from Congress or a lack of professionalism on the part of the Census Bureau. To the contrary, the *Report* stated that the 1990 census was "the most expensive in history," J.A. 50, and was "better designed and executed than any previous census," J.A. 47. Rather, the *Report* explained, the decline in accuracy was the result of demographic and social trends that made the population significantly more difficult to count through the use of traditional methods.<sup>8</sup> The *Report* also stated that "[e]very indication since 1990 suggests that the census-taking environment is likely to be even more difficult in 2000 than it was in 1990." J.A. 52.

The *Report to Congress* concluded that "[d]ue to changes in American society, the most accurate census feasible can

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<sup>8</sup> The *Report to Congress* explained that "[t]he number of people working more than one job had increased [by 1990], along with the number of multiple-worker families, so people were home less often when enumerators visited. When people were home, they were less willing to spend time filling out a census form." J.A. 51. It also noted that "Americans were inundated with junk mail, mail that obscures important documents such as census forms"; that "[m]ore Americans lived in housing that was remote or inaccessible"; and that "[m]ore Americans were becoming alienated from society in general and more mistrustful of government in particular." *Ibid.* The *Report* identified "[t]he sharp decline in the rate that people return their census questionnaires"—from 78% in 1970 to 65% in 1990—as "a clear example of how the changes in society directly affect the operation of the census." J.A. 52.



no longer be taken by traditional physical enumeration methods alone. The introduction of a limited use of sampling is necessary for an accurate and cost-effective census in 2000." J.A. 45.<sup>4</sup> The *Report* stated that "[a]ll significant departures from the methodologies used in previous censuses have been endorsed by the [National Academy of Sciences], the Bureau's advisory committees, and the scientific community." J.A. 42. It also observed that "[t]he Plan for Census 2000 has received strong support from professional statisticians and demographers—experts are convinced that the introduction of a limited use of scientific sampling in Census 2000 will result in a more accurate, less costly census." J.A. 42-43; see also J.A. 83-85.

Two forms of statistical sampling are at issue in this litigation. First, the Census Bureau intends to use sampling in the Nonresponse Follow-Up (NRFU) phase of the census. In the 1990 census, only 65% of all U.S. households (as compared to 78% in 1970) returned the census forms provided to them by mail. J.A. 52, 88. Census Bureau enumerators visited non-responding households as many as six times before relying on other means to attempt to ascertain the number of persons residing in them. J.S. App. 6a. For the 2000 census, the Bureau plans to secure information from a randomly selected sample of non-responding households in each census tract, and to determine the likely number of persons living in other non-responding units based on the sample data. J.A. 88-92.<sup>5</sup>

<sup>4</sup> The *Report* estimated that use of traditional techniques alone would result in an error rate of at least 1.9% for all geographic levels from the national level to the census tract level. J.A. 44. The Bureau projected that a census conducted in accordance with its own plan would have a substantially smaller error rate at all geographic levels. *Ibid.*

<sup>5</sup> The Bureau's objective is to obtain responses through either mail response or NRFU from 90% of the housing units in each census tract. In order to achieve that goal, the Bureau plans to contact a larger percentage of the households in tracts with lower mail response rates. See J.A. 90-91.

Second, after the initial phase of the census, the Census Bureau plans to conduct a survey of approximately 750,000 housing units furnishing a representative sample of a wide variety of demographic groups, defined by such categories as race, age, urban or rural place of residence, and status as homeowner or renter. J.A. 92-93. By comparing the results of that survey to those of the initial phase of the census, the Bureau can assess the frequency with which persons having particular demographic characteristics were missed in the initial phase. J.A. 94. Based on that survey, the Bureau will determine population figures for States and political subdivisions nationwide. J.A. 94-98; J.S. App. 7a-9a.

7. After receiving the *Report to Congress*, Congress enacted the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, 111 Stat. 2440. Section 209(b) of that Act provides:

Any person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

111 Stat. 2481. Section 209(c)(2) states that the *Report to Congress*, together with the Commerce Department's Census 2000 Operational Plan, "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding." 111 Stat. 2482. Section 209(d) identifies "either House of Congress" as "an aggrieved person" within the meaning of Section 209(b). *Ibid.* Section 209(e)(1) states that any civil action brought pur-

suant to the Act shall be heard by a three-judge district court, whose decision is reviewable by appeal directly to this Court. *Ibid.*<sup>6</sup>

8. The plaintiff in this case (appellee in this Court) is the United States House of Representatives. The House filed suit pursuant to the judicial review provision of Section 209(e)(1) of the 1998 Appropriations Act, contending that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act and Article I, Section 2, Clause 3 of the Constitution. The Department of Commerce, the Secretary of Commerce, the Census Bureau, and the Acting Director of the Census Bureau (collectively Commerce Department) were named as defendants.

The Commerce Department moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. The district court denied the Commerce Department's motion to dismiss, as well as motions to dismiss filed by four groups of intervenor-defendants, and granted the House of Representatives' motion for summary judgment. J.S. App. 1a-67a.

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<sup>6</sup> In his signing statement for the 1998 Appropriations Act, the President observed that

in providing for a right of action to challenge the use of sampling before completion of the 2000 Census, the Act does not, nor could it, modify the "immutable requirements" of Article III of the Constitution regarding ripeness and standing to sue. Representatives of my Administration informed the Congress while it was considering the census provisions of their doubts whether the right to sue in the Act satisfies Article III requirements. Opponents of sampling in the 2000 Census will have the opportunity to attempt to persuade the courts that it does, but the Department of Justice is obligated to challenge any suits that fail to meet applicable justiciability requirements.

Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, 33 Weekly Comp. Pres. Doc. 1926, 1927 (Nov. 26, 1997).

a. The district court first concluded that the House of Representatives possessed a cognizable stake in the controversy, explaining that the House had "properly alleged a judicially cognizable injury through [1] its right to receive information by statute and through [2] the institutional interest in its lawful composition." J.S. App. 16a.

With respect to the first claim of injury, the court observed that the President is required by 2 U.S.C. 2a(a) to "transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population." J.S. App. 16a. The district court stated that "[t]he inability to receive information which a person is entitled to by law is sufficiently concrete and particular to satisfy constitutional standing requirements." *Ibid.* (citing *Federal Election Comm'n v. Akins*, 118 S. Ct. 1777 (1998)). It held that "[i]f statistical sampling in the apportionment census violates the Census Act or the Constitution, Congress will not receive information that it is entitled to by statute." *Id.* at 17a.

The district court stated that the House's claim of informational injury was particularly "compelling" because "the information sought by the House here is necessary to perform a constitutionally mandated function." J.S. App. 17a. The court also found the House's claim of standing to be supported by decisions holding—particularly in the context of legislative subpoenas—that "a legislative body suffers a redressable injury when that body cannot receive information necessary to carry out its constitutional responsibilities." *Id.* at 18a (citing, *inter alia*, *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)).

With respect to the second claim of injury, the House of Representatives contended that an unlawfully conducted census "would necessarily result in the unlawful composition of any House elected and seated pursuant to the resulting apportionment." J.S. App. 20a. The district court acknowledged that the House will continue to be composed of 435



Representatives regardless of the manner in which the 2000 census is conducted. *Id.* at 21a. Relying primarily on this Court's decision in *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), however, the district court held that "a legislative body has a judicially cognizable interest in matters affecting its composition so as to satisfy Article III, whether or not the challenged conduct will ultimately have an effect on the size of the body." J.S. App. 22a.

The district court also held that the current House of Representatives for the 105th Congress could properly assert the interests of the House of Representatives that will convene during the 107th Congress in the year 2001, when the President's apportionment statement is transmitted to Congress. J.S. App. 22a-26a. The court concluded as well that the threatened injury was sufficiently immediate to satisfy constitutional requirements. *Id.* at 28a-37a.

b. On the merits, the district court held that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act. The court first concluded that 13 U.S.C. 195, as originally enacted in 1957, unambiguously prohibited the use of sampling in the congressional apportionment process. J.S. App. 48a-49a.<sup>7</sup> The court concluded that the 1976 amendments to the Census Act did not eliminate that proscription. It noted that the Commerce Department in 1980 "took the position that statistical sampling in connection with the apportionment enumeration remained prohibited." *Id.* at 50a.

Examining the text of Section 195 in its current form, the district court acknowledged that an exception to a mandatory statutory directive will not always be construed to

<sup>7</sup> As enacted in 1957, Section 195 provided that "[e]xcept for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195 (1958); see J.S. App. 48a.

impose a prohibition. J.S. App. 51a-52a. The court stated, however, that with respect to Section 195, "[c]ommon sense and background knowledge concerning the subject matter of the exception dictates that the 'except' clause must be read as prohibitory." *Id.* at 52a. The court explained:

In light of the special position occupied by congressional apportionment in the universe of functions entrusted to the Bureau of the Census, the most logical reading of the effect of the [1976] amendments to section 195 is that while they strengthen the call for sampling in non-apportionment information gathering, they do not have the implicit collateral effect of transforming what was formerly an absolute proscription into a matter of pure agency discretion.

*Id.* at 54a. The court also examined the legislative history of the 1976 amendment to Section 195 and found no indication that Congress had intended to alter prior law regarding the use of sampling in connection with the apportionment process. *Id.* at 54a-59a. The district court stated as well that the 1976 amendment to Section 195 would have been an "oblique" (*id.* at 58a) and "indirect" (*id.* at 59a) way of eliminating a pre-existing barrier to the use of sampling for apportionment purposes.

The district court also rejected the Commerce Department's argument that Section 141(a) affirmatively authorizes the use of sampling in determining the population for purposes of apportioning Representatives. J.S. App. 59a-64a. Even assuming that Section 141(a) might otherwise be read to authorize sampling for apportionment purposes, the court held, Section 195 is "more specific[ally]" directed to the issue of sampling and is "therefore controlling to the extent that the two provisions conflict." *Id.* at 61a. The court concluded that "while § 141 permits sampling techniques and surveys in the conduct of the decennial census, that general grant is subject to the more specific 'Use of Sampling' directive in

§ 195, which \* \* \* explicitly proscribes the use of sampling for apportioning representatives among the states." *Id.* at 62a. The court also found no evidence in the legislative history of Section 141(a) suggesting that Congress intended that provision to authorize the use of sampling in the apportionment of Representatives. *Id.* at 62a-64a.

c. Because the district court concluded that the Secretary's plan for the 2000 census violated the Census Act, it declined to address the question whether the plan was consistent with Article I, Section 2, Clause 3 of the Constitution. J.S. App. 64a.

### SUMMARY OF ARGUMENT

1. The House of Representatives lacks standing to bring this suit.

a. The House cannot establish standing based on its claim of "informational injury." The gravamen of that claim is that the manner in which the Secretary intends to conduct the 2000 census will cause the House not to receive information—*i.e.*, state-level population figures derived without the use of sampling—that the House believes it is entitled to receive. This Court's decisions do not suggest, however, that Congress may vest itself with a judicially cognizable informational interest in the outcome of Executive Branch decisions simply by requiring the President to report those decisions to Congress. Nor is there any basis for the district court's conclusion that the information at issue here is necessary in order for Congress to perform its constitutional apportionment function. Congress has already discharged its constitutional obligations, by authorizing the Secretary of Commerce to conduct the decennial census, and by establishing a permanent, self-executing statutory mechanism for reapportioning Representatives among the States after the census is completed.

b. The district court also erred in holding that the potential effect of the decennial census on the makeup of the

House of Representatives gives the House standing to sue. However the 2000 census is conducted, the 108th and subsequent Houses will continue to be composed of 435 Members and will continue to exercise the same constitutional powers. Historical practice makes clear, moreover, that disputes between the political Branches regarding their constitutional prerogatives have not traditionally been regarded as properly susceptible of judicial resolution.

2. Contrary to the district court's decision, the Census Act authorizes rather than prohibits the use of statistical sampling in determining the state-level population figures to be used in apportioning Representatives. The Act directs the Secretary of Commerce to take the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). The authority to use sampling granted by Section 141(a) has not been withdrawn by 13 U.S.C. 195. Section 195's opening proviso simply makes clear that the Secretary is not *required* to use sampling in determining the state-level population figures to be used for apportionment. Neither the text of Section 195 nor the overall statutory scheme suggests, however, that the proviso should be construed to prohibit the use of sampling for apportionment purposes.

The district court's statutory analysis was substantially based on its view that Section 195, as originally enacted in 1957, unambiguously prohibited the use of sampling in connection with the apportionment of Representatives among the States. The court misunderstood the original purpose and effect of Section 195. Section 195 was enacted at the request of the Department of Commerce in order to increase the Department's flexibility in conducting census activities. That Section's opening proviso made clear that the authorization to employ sampling techniques did not extend to the determination of population for apportionment purposes. The proviso did not, however, establish a new, independent legal barrier to the use of sampling in apportioning Repre-



sentatives. Because the predicate for the legislative initiative was the Commerce Department's understanding that existing law forbade the use of sampling, the effect of the opening proviso was that sampling for apportionment purposes *remained* unlawful. However, the pre-1957 Census Act provisions upon which the Commerce Department's understanding rested have been repealed or substantially amended, and the Act in its current form expressly authorizes the use of sampling in the conduct of the decennial census. The Commerce Department's plan for the 2000 census is therefore lawful.

3. The Commerce Department's plan for the 2000 census is consistent with the constitutional requirement that the apportionment of Representatives among the States must be based on an "actual Enumeration" of the population. Since at least 1577, the word "enumeration" has been understood to mean "[t]he action of ascertaining the number of something; *esp.* the taking [of] a census of population; a census." 3 *The Oxford English Dictionary* 227 (1933). Rather than requiring that the relevant numbers be determined through a particular methodology, the Census Clause vests Congress with extremely broad discretion, providing that the census shall be conducted "in such Manner as [Congress] shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3.

The drafting history of the Census Clause further refutes the House of Representatives' claim that the Framers intended to restrict Congress's choice of census methodologies. The phrase "actual Enumeration" first appeared in the draft Constitution submitted to the Convention by the Committee of Style and Arrangement, which evidently regarded that phrase as substantively equivalent to the prior draft's directive that the "number" of each State's inhabitants "shall \* \* \* be taken in such manner as [Congress] shall direct." The House of Representatives' interpretation of the Census Clause is also inconsistent with historical practice. From the time of the First Congress, the conduct of the decennial cen-

sus has routinely involved methodologies that cannot plausibly be characterized as a "headcount" of individuals "reckoned singly."

## ARGUMENT

### I. THE HOUSE OF REPRESENTATIVES LACKS STANDING TO BRING THIS SUIT

A definitive ruling by this Court regarding the legality of the Commerce Department's plan for the 2000 census would have significant practical advantages. The Framers of our Constitution, however, did not authorize the federal courts to issue advisory opinions. Article III empowers the federal courts to resolve only those disputes that present actual "Cases" or "Controversies." The present suit does not satisfy that fundamental constitutional requirement.

#### A. The House Of Representatives' Asserted "Informational Injury" Does Not Provide A Basis For Standing

To satisfy the "case" or "controversy" requirement of Article III, a plaintiff must demonstrate, *inter alia*, that it has "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). In the instant case, the district court held that "[i]f statistical sampling in the apportionment census violates the Census Act or the Constitution, Congress will not receive information that it is entitled to by statute." J.S. App. 17a. Because "[t]he inability to receive information which a person is entitled to by law is sufficiently concrete and particular to satisfy constitutional standing requirements," *id.* at 16a (citing *Federal Election Comm'n v. Akins*, 118 S. Ct. 1777 (1998)), the court concluded that the House would suffer a judicially cognizable "informational injury" if the Commerce Department's plan

for the 2000 census was put in effect. That holding was erroneous.

1. The 107th Congress will take office in January 2001. Within one week after the beginning of the first regular session of that Congress, the President will be required to "transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the \* \* \* decennial census of the population, and the number of Representatives to which each State would be entitled." 2 U.S.C. 2a(a). Nothing in the Census Bureau's plan for the 2000 census suggests, and the House of Representatives does not contend, that the President will fail to transmit to Congress the number of persons in each State "as ascertained under the \* \* \* decennial census." There is consequently no likelihood that the Bureau's conduct of the decennial census will result in a violation of the statutory provision that deals specifically with the transmittal of census information to Congress.

Rather, the House of Representatives' claim of "informational injury" rests upon the fact that a census conducted in accordance with the Census Bureau's plan will inevitably produce population figures different from those that would be derived from a census performed without the use of statistical sampling. Because 2 U.S.C. 2a(a) requires the President to transmit to Congress population figures "as ascertained under the \* \* \* decennial census," the choice between different census methodologies will in turn affect the character of the data that Congress receives. The gravamen of the House's claim of harm is that the (allegedly unlawful) manner in which the Secretary intends to conduct the census will cause the House not to receive information—i.e., state-level population figures derived without the use of sampling—that it would receive if the census were performed in the manner that the House believes to be required by law.

To treat that alleged harm as a judicially cognizable "informational injury" would permit Congress to give itself a cognizable interest in the outcome of *any* Executive Branch decision, simply by requiring executive officials to report that decision to Congress. Whenever an Executive Department is directed to inform Congress of its actions, its choice between substantive policy alternatives will have ancillary effects on the character of the information provided to the legislature. Where such a reporting requirement exists, a House of Congress (or Member thereof) who believes that executive officials have acted unlawfully can always plausibly claim that it (or the Member) has failed to receive information that would have been obtained if a different action had been taken. To permit such an "injury" to serve as the predicate for a House of Congress or one of its Members to obtain a judicial determination of the legality of the underlying Executive Branch conduct would vest Congress with a continuing cognizable stake and substantial institutional role in the execution of the laws. That means of effectuating Congress's policy objectives is not consistent with the fundamental separation of the powers of the political Branches under the Constitution. Compare, e.g., *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). By acting as arbiter of such intra-governmental disputes, moreover, the Judicial Branch would move outside the "restricted role for Article III courts" under the Constitution, *Raines v. Byrd*, 117 S. Ct. 2312, 2322 (1997), as tribunals charged with vindicating "the rights of individuals," *Defenders of Wildlife*, 504 U.S. at 576. See also *Raines*, 117 S. Ct. at 2318 (observing that the law of Article III standing "is built on a single basic idea—the idea of separation of powers") (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)); p. 24, *infra*.

2. The district court attempted to cabin the effect of its decision by asserting that "the information sought by the House here is necessary to perform a constitutionally man-



dated function." J.S. App. 17a; see also *id.* at 20a (stating that the House is "injured when it cannot obtain information necessary to perform its constitutional apportionment function"). Contrary to the district court's suggestion, however, no further legislative action is required to effect a reapportionment of Representatives among the States in accordance with the 2000 census. Congress has already discharged its obligations under Article I, Section 2, Clause 3, by authorizing the Secretary of Commerce to conduct a "decennial census of population \* \* \* in such form and content as he may determine" (13 U.S.C. 141(a)), and by establishing a permanent, self-executing mechanism (see 2 U.S.C. 2a (1994 & Supp. II 1996)) for reapportioning Representatives among the States after the decennial census has been completed. See *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 452 n.25 (1992) (Section 2a "ma[kes] the reapportionment process self-executing, eliminating the need for Congress to enact an apportionment Act after each decennial census"); *Franklin v. Massachusetts*, 505 U.S. 788, 791-792 (1992); note 1, *supra*.<sup>8</sup>

<sup>8</sup> Under the existing statutory scheme, neither House of Congress plays any role in the apportionment process after the transmittal by the President to Congress (see 2 U.S.C. 2a(a)) of "the whole number of persons in each State" and "the number of Representatives to which each State would be entitled." Rather, "[i]t shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of [the census figures from the President], to send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. 2a(b) (Supp. II 1996). The figures transmitted by the President are binding upon the Clerk. See *ibid.* ("Each State shall be entitled \* \* \* to the number of Representatives shown in the statement required by subsection (a) of this section."); *Franklin*, 505 U.S. at 798 ("It is not until the President submits the information to Congress that the target stops moving, because only then are the States entitled by § 2a to a particular number of Representatives."); *id.* at 799 ("it is the President's personal transmittal of the report to Congress that settles the apportionment"); *id.* at 824 (Scalia, J., concurring in part and concurring in the judgment) (noting "the Clerk's purely ministerial role" in the apportionment process).

Neither the district court nor the House of Representatives has attempted to specify the type of apportionment legislation that Congress might plausibly be expected to enact if it received state-level population figures derived without the use of sampling. The reason for that omission is apparent. This lawsuit represents the current House's effort to achieve its policy objectives by means *other* than passing a law—the way the Constitution prescribes for Congress to affect the duties of persons outside the Legislative Branch. *INS v. Chadha*, 462 U.S. 919, 952, 954-955 (1983).<sup>9</sup> The House's claim of "informational injury" as a basis for bringing suit should therefore be rejected.<sup>10</sup>

<sup>9</sup> The Commerce Department has not yet been provided with the funds necessary to complete the 2000 census, and it will therefore be able to carry out that task only if Congress enacts new appropriations measures. Compare *Defenders of Wildlife*, 504 U.S. at 565 n.2 (particularly when "the acts necessary to make the injury happen are at least partly within the plaintiff's own control," the Court "ha[s] insisted that the injury proceed with a high degree of immediacy").

<sup>10</sup> Essentially for the reasons stated in the text, the district court's reliance on *Federal Election Commission v. Akins*, 118 S. Ct. 1777 (1998), and *McGrain v. Daugherty*, 273 U.S. 135 (1927), was misplaced. The Court in *Akins* found "no reason to doubt [the plaintiffs'] claim that the information [they sought to obtain] would help them (and others to whom they would communicate it) to evaluate candidates for public office." 118 S. Ct. at 1784. Similarly in *McGrain*, the Court upheld the challenged subpoena on the basis of its determination "that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes." 273 U.S. at 177. The Court specifically noted that "neither house [of Congress] is invested with 'general' power to inquire into private affairs and compel disclosures." *Id.* at 173-174.

In the instant case, the House of Representatives seeks a judicial order directing that a particular methodology be used in conducting the 2000 census. The obvious purpose and effect of such an order is to change the character of the state-level population figures that will be certified as official by the President, and that will, through an existing, self-executing statutory mechanism, govern the reapportionment of Representatives among the States. Neither the fact that those official population figures must be transmitted to Congress before they are sent to the States, nor the theoretical possibility that Congress might choose to enact a new ap-

**B. The House Of Representatives' Purported Interest In "Matters Affecting Its Composition" Does Not Satisfy The Requirements Of Article III**

The district court also erred in holding that the House of Representatives "has a judicially cognizable interest in matters affecting its composition" sufficient to bring this suit within the requirements of Article III. J.S. App. 22a. Regardless of the manner in which the 2000 census is conducted, the House convened during the 108th and subsequent Congresses will continue to be composed of 435 Members and will continue to exercise the same constitutional powers. Whatever effect the census and resulting apportionment process may have on individual Members (or aspiring Members)—and any such effect is entirely speculative at the present time—it will impose no injury on the House as a collective body.

In reaching the contrary conclusion, the district court principally relied (see J.S. App. 20a-22a) on this Court's decision in *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972). The court's reliance on that decision was misplaced. In *Beens*, the Minnesota State Senate sought to appeal from a federal district court judgment holding the state legislature to be malapportioned and directing the adoption of a new apportionment plan—one that would have reduced from 67 to 35 the number of senatorial districts within the State. *Id.* at 188-193. The Court held that "the senate is an appropriate legal entity for purpose of intervention and, as a consequence, of an appeal in a case of this kind." *Id.* at 194.

*Beens* holds that a state legislative body suffers a cognizable injury as a result of an order directing that the body's composition be changed. The present case, however, is dif-

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portionment law when it receives those figures, suffices to give the House of Representatives standing to sue to compel Executive Branch officials to take particular actions under existing law.

ferent in important respects. As we explain above, the decision whether to use sampling in conducting the 2000 census can have no effect on the number of Representatives that will convene in the 108th or any subsequent Congress. The House, moreover, has not initiated this litigation to defend the manner in which Representatives in the current House are apportioned among the States. Rather, the House claims that it will suffer a judicially cognizable injury if the Census Bureau's conduct of the 2000 census results in a different apportionment of Representatives among the States in a future Congress than if sampling had not been utilized. Finally, the instant case was filed by a federal legislative entity, whose capacity to sue in order to vindicate the general public and governmental interest in the execution of the laws is subject to constitutional separation-of-powers limitations that do not apply to state entities like the appellant in *Beens*.<sup>11</sup>

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<sup>11</sup> As the district court emphasized (J.S. App. 21a-22a), the Court in *Beens* referred approvingly to *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964) (per curiam), aff'd mem., 381 U.S. 415 (1965). But *Silver*, like *Beens*, involved a challenge to the apportionment of a state legislative body and therefore did not pose the separation-of-powers concerns presented here. Moreover, the district court in *Silver* permitted the California State Senate to intervene as an interested party on the ground that "it would be directly affected by the decree of th[at] court." 241 F. Supp. at 579. The court's remedial decree ordered "that the California State Legislature reapportion the California State Senate consistent with this opinion." *Id.* at 586. There is no question that the State Senate was "directly affected" by that order: the existing California Senate was directed to enact legislation to correct a constitutional violation. The Commerce Department's plan for the 2000 census imposes no comparable obligation on the House of Representatives.

Nor does *Powell v. McCormack*, 395 U.S. 486 (1969) (cited at J.S. App. 20a), support the district court's jurisdictional holding. The Court in *Powell* held that the House of Representatives could not refuse to seat an individual who was duly elected to serve in the House and who satisfied the age, citizenship, and residence requirements set forth in Article I, Section 2, Clause 2 of the Constitution. 395 U.S. at 550. The Court stated that "[u]nquestionably, Congress has an interest in preserving its institu-



If the "institutional" injury alleged by the House of Representatives is an adequate basis for invoking the jurisdiction of an Article III court, executive officials would presumably have standing to challenge Acts of Congress that they believe improperly intrude upon the prerogatives of the President or the Executive Branch. Such inter-Branch disputes, however, have never been thought susceptible of judicial resolution. In *Raines v. Byrd*, 117 S. Ct. 2312 (1997), this Court held that the plaintiff Members of Congress lacked standing to bring a constitutional challenge to the Line Item Veto Act. The Court observed, *inter alia*, that "historical practice appears to cut against" the plaintiffs' claim of standing. *Id.* at 2321. The Court found it "evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Ibid.*; see *id.* at 2321-2322 (citing historical examples). The Court acknowledged that "[t]here would be nothing irrational about a system which granted standing in these cases," but observed that such a system "is obviously not the regime that has obtained under our Constitution to date." *Id.* at 2322. The same conclusion follows here.<sup>12</sup>

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*tional integrity*, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds." *Id.* at 548 (emphasis added). Read in context, the italicized language simply recognizes that Congress in exercising its powers of self-governance may appropriately act to protect its own "institutional integrity." Nothing in *Powell* suggests that Congress's desire to maintain "institutional integrity" constitutes a judicially cognizable interest that gives Congress (or one of its Houses) standing to sue in federal court.

<sup>12</sup> The current House of Representatives for the 105th Congress will not suffer either of the harms identified by the district court as proper bases for standing. The President is required by 2 U.S.C. 2a(a) to transmit state-level population figures within one week after the beginning of the first session of the 107th Congress. The House that convenes during the 108th Congress will be the first House whose membership could po-

## II. THE CENSUS ACT AUTHORIZES THE CENSUS BUREAU TO EMPLOY STATISTICAL SAMPLING IN DETERMINING THE POPULATION FOR PURPOSES OF APPORTIONING REPRESENTATIVES AMONG THE STATES

The district court erred in holding that the Census Act prohibits the Secretary from employing statistical sampling techniques in determining the population for purposes of apportioning Representatives among the States. Rather than barring the use of sampling, Congress has vested the Secretary with broad discretion to conduct the decennial census "in such form and content as he may determine," and has specifically authorized "the use of sampling procedures." 13 U.S.C. 141(a). If the Court determines that the House of Representatives' suit satisfies the requirements of Article III, the judgment of the district court should be reversed.

### A. The Decision Of The District Court Is Not Consistent With The Text Of The Census Act

#### 1. 13 U.S.C. 141(a) expressly authorizes the use of "sampling procedures" in the conduct of the "decennial census of population"

The Census Act directs the Secretary to "take a decennial census of population as of the first day of April of [the census] year, \* \* \* in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). Because no other provision of law authorizes the Secretary to conduct the "actual

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tentially be affected by the results of the 2000 census. The district court's jurisdictional holding therefore rests on the proposition that the current House of Representatives may sue to vindicate the interests of successor Houses. See J.S. App. 22a-26a. Both the propriety and the legality of statistical sampling, however, have been the subject of extensive debate within Congress. It therefore cannot be said with any certainty that a majority of the House of Representatives that convenes during the 107th and/or the 108th Congress will share the current House's opposition to the use of statistical sampling in connection with the 2000 decennial census.

Enumeration" required by Article I, Section 2, Clause 3, it is apparent that the "decennial census" mandated by Section 141(a) is to be used in determining the population for purposes of apportioning Representatives among the States. In *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996), this Court cited Section 141(a) as the provision by which "Congress has delegated its broad authority over the census to the Secretary."

Other features of the statutory scheme reinforce the conclusion that the "decennial census of population" conducted pursuant to Section 141(a) is to be used in the apportionment process. Thus, Section 141(b) refers to "[t]he tabulation of total population by States *under subsection (a) of this section* as required for the apportionment of Representatives in Congress among the several States." 13 U.S.C. 141(b) (emphasis added). In addition, 2 U.S.C. 2a(a) requires the President to "transmit to the Congress a statement showing the whole number of persons in each State, \* \* \* *as ascertained under the \* \* \* decennial census* of the population, and the number of Representatives to which each State would be entitled" (emphasis added). Taken together, the relevant statutory provisions unambiguously authorize the Secretary to employ "sampling procedures and special surveys" in conducting the "decennial census of population," which census will be used to determine the state-level population figures that are employed in the apportionment process.

As the *Report to Congress* explains, the decennial census has historically been used to collect a variety of demographic information beyond the total number of residents within each State. See J.A. 85. Consistent with its practice since 1940, the Census Bureau plans to use both a long and a short form questionnaire during the 2000 census, delivering the long form to a sample of housing units and the short form to the rest. J.A. 85-86. "[T]he long form will ask the same 7 questions that appear on the short form, plus questions on an

additional 27 subjects that are either specifically required by law to be included in the census or are required to implement other federal programs." *Ibid.* The House of Representatives argued in the district court that Section 141(a)'s reference to "sampling and special surveys" should be construed to "appl[y] only to the myriad of demographic data that the Bureau collects in conjunction with the decennial enumeration." J.S. App. 60a.

We agree that the Secretary could *choose* to conduct the 2000 census in the manner that the House suggests—i.e., by determining state-level population figures solely through the use of traditional enumeration techniques, while employing sampling to collect additional demographic data. The Secretary's *authority* to employ "sampling," however, cannot reasonably be construed as limited to the collection of such supplemental information. The text of Section 141(a) contains no such limitation.<sup>13</sup> As Congress has recently recognized, moreover, "the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States." 1998 Appropriations Act, § 209(a)(2), 111 Stat. 2481. It is implausible to suppose that Section 141(a)'s facially unqualified authorization to employ "sampling" in conducting the "decennial census of population" is subject to the implicit condition that sampling may not be used in carrying out the core function for which the decennial census is performed. That is particularly so in light of the fact that the authorization to use "sampling" is simply one aspect of Section 141(a)'s broad general grant of authority to the Secretary to conduct the decennial census "in such form and content as he may determine."

<sup>13</sup> By contrast, 13 U.S.C. 141(e)(2) states unambiguously that "[i]nformation obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States."



**2. 13 U.S.C. 195 does not prohibit the use of sampling in determining the population for the purpose of apportioning Representatives among the States**

The district court agreed that Section 141(a) "standing alone appears to permit statistical sampling in congressional apportionment." J.S. App. 61a. The court held, however, that 13 U.S.C. 195 unambiguously prohibits the use of sampling for purposes of apportionment; that Section 195 is the more specific of the two provisions; and that Section 195 is "therefore controlling to the extent that the two provisions conflict." J.S. App. 61a. The court's decision rests on a misreading of the statutory language.

Section 195 states that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195 (emphasis added). The italicized language makes clear that Section 195's generally applicable mandatory directive to the Secretary—i.e., that statistical sampling "shall" be used if its use is considered "feasible"—does not apply to the determination of state-level population figures used for purposes of apportionment.<sup>14</sup> No rule of statutory construction suggests, however,

<sup>14</sup> With respect to the use of sampling for purposes other than apportionment, Section 195's language is neither wholly mandatory nor wholly non-directive. Because the Secretary is required to use sampling only "if he considers it feasible," he retains meaningful discretion to determine whether sampling should be employed in a particular instance. It is clear, however, that Section 195 was intended to impose a significant constraint on the Secretary's discretion. That is especially apparent when Section 195 in its current form is compared to the version originally enacted in 1957, which stated that the Secretary "may" use sampling for purposes other than apportionment "where he deems it appropriate." 13 U.S.C. 195 (1958); see note 7, *supra*. The Conference Report accompanying the 1976 Census Act amendments states that Section 195 as amended "differs from the [original] provisions of section 195 which grant the Secretary discre-

that activities specifically excepted from a mandatory directive are thereby prohibited. Rather, the effect of Section 195's opening proviso is to render that Section's mandatory directive inapplicable to "the determination of population for purposes of apportionment," leaving the scope of the Secretary's authority in that area to be defined by other provisions of law—specifically, by Section 141(a)'s express vesting of discretion in the Secretary to use "sampling procedures" in the conduct of the decennial census.<sup>15</sup>

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tion to use sampling when it is considered appropriate. The section, as amended, strengthens the congressional intent that, whenever possible, sampling shall be used." H.R. Conf. Rep. No. 1719, 94th Cong., 2d Sess. 13 (1976).

<sup>15</sup> The United States Code includes a variety of provisions containing the "except"/"shall" formulation in contexts where the exception cannot reasonably be construed as prohibiting the excepted activity. See, e.g., 2 U.S.C. 179n(a)(1) (Supp. II 1996); 2 U.S.C. 384(a); 5 U.S.C. 555(e); 10 U.S.C. 4621(a); 10 U.S.C. 12643(a); 12 U.S.C. 2076a; 16 U.S.C. 230d; 16 U.S.C. 832g; 30 U.S.C. 871(b). Other provisions contain an "except"/"may not" formulation in contexts where the exception cannot plausibly be construed to impose an affirmative requirement. See, e.g., 5 U.S.C. 5383(c); 7 U.S.C. 7465(c)(3) (Supp. II 1996). Although the district court stated that "an exception from a command to do 'X' more often than not represents a prohibition against doing 'X' with respect to the subject matter covered by the exception," J.S. App. 52a, the court identified no provision in the Code (or in any other legal materials) in which an exception to a mandatory directive could reasonably be understood to effect a prohibition.

Conceivably there might be circumstances in which an overall statutory scheme so closely circumscribes administrative discretion as to render it implausible that a particular decision has been entrusted to Executive Branch officials. In that context, a statutory exception to a mandatory directive might reasonably be construed as a prohibition. The Census Act, however, is not such a statute. The Act does not specify the details of census administration, but instead authorizes the Secretary to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a); see *City of New York*, 517 U.S. at 19 (noting that "the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and that, in Section 141(a), "Congress has delegated its broad authority over the census to the Secretary"); *Tucker v. United States Dep't of Commerce*, 958 F.2d 1411, 1417 (7th Cir.) (Posner, J.) (emphasizing breadth of Census Bureau's dis-

Congress's apparent purpose in directing the Secretary to employ sampling techniques whenever feasible was to reduce the cost and burden of census activities. See S. Rep. No. 1256, 94th Cong., 2d Sess. 5 (1976) (stating, with respect to the mid-decade census, that "the use of sampling procedures and surveys is urged for the sake of economy and reducing respondent burden"); see also *id.* at 9, 12, 13. In order to achieve those savings, Congress required the Secretary to employ sampling techniques if they are feasible, even if the Secretary does not believe that sampling will improve the accuracy of the count. With respect to the apportionment of Representatives among the States, however, Congress understandably declined to impose such a directive, and thereby to interfere with the Secretary's judgment as to what measures will ensure the most accurate population figures practicable. The determination of state-level population figures accordingly remains subject to 13 U.S.C. 141(a), which authorizes the Secretary to conduct the "decennial census of population \* \* \* in such form and content as he may determine," and which permits but does not require the use of "sampling procedures and special surveys."

Thus, we have no quarrel with the district court's observation that "the congressional apportionment function merits particularized treatment" because it occupies a "special position \* \* \* in the universe of functions entrusted to the Bureau of the Census." J.S. App. 54a. Because the apportionment of Representatives among the States is the sole constitutional purpose of the census, it is particularly important that population counts used for that purpose be as accurate as practicable. See pp. 46-47, *infra*. Construing

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cretion), cert. denied, 506 U.S. 953 (1992). Thus, while we agree with the district court that "background knowledge" (J.S. App. 52a) is highly germane to the construction of ambiguous statutory provisions, the operative background rule here (in Section 141(a)) vests the Secretary with very broad discretion over the conduct of the decennial census, and specifically authorizes him to use "sampling."

Section 195 in accordance with its terms—*i.e.*, as exempting the apportionment process from a generally applicable directive to cut costs and lessen the burden on respondents—is fully consistent with the "special position" of congressional apportionment. Interpreting that Section to preclude the Secretary from employing sampling techniques that he has reasonably determined will enhance accuracy is not.

Congress's reasons for exempting congressional apportionment from Section 195's mandatory directive therefore do not logically support the imposition of a ban on sampling in that context. Reading Section 195 in the manner we advocate ensures that the relevant provisions of the Census Act form a coherent whole. By contrast, the construction of Section 195 adopted by the district court renders that provision flatly inconsistent with Section 141(a)'s express authorization of sampling in the conduct of the decennial census. Even if Section 195 were otherwise ambiguous, established rules of statutory construction would require that it be interpreted in a manner that preserves the internal consistency of the Act as a whole.<sup>16</sup>

#### **B. The History Of The Census Act Does Not Support The District Court's Construction Of Section 195**

As originally enacted in 1957, Section 195 provided that "[e]xcept for the determination of population for apportionment purposes, the Secretary *may*, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13

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<sup>16</sup> "It is well established that [a court's] task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973); see also, *e.g.*, *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," as where "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").



U.S.C. 195 (1958) (emphasis added); see J.S. App. 48a. The district court stated that Section 195 in its original form "proscrib[ed]" the use of sampling in connection with congressional apportionment. *Ibid.* The court then examined the legislative history of the 1976 amendment to Section 195. *Id.* at 49a-51a, 54a-56a. Finding no expression in that history of an intent to change Section 195's prior treatment of the apportionment process, and believing that replacement of the word "may" with the word "shall" would have been an "oblique" (*id.* at 58a) and "indirect" (*id.* at 59a) way of eliminating the earlier prohibition it believed was imposed by Section 195, the court concluded that the original bar remained in place. *Id.* at 56a-59a.

Even if the court had correctly understood the version of Section 195 that was enacted in 1957, there would have been no legitimate basis for deviating from the current text of Section 141(a) and the Census Act as a whole. In fact, however, the district court misconstrued the original version of Section 195. Even in its original form, Section 195 itself did not prohibit the use of sampling in connection with apportionment. Rather, Section 195 was enacted to increase the Secretary's flexibility in the conduct of the decennial census by creating a partial exemption to a pre-existing sampling prohibition rooted elsewhere in the Act. The opening proviso to Section 195 made clear that the authorization to use sampling did not extend to the apportionment of Representatives among the States, thereby leaving the pre-existing ban in place with respect to congressional apportionment. But the proviso itself has never constituted an independent, freestanding barrier to the use of sampling.

In the ensuing years, the pre-existing provisions of the Census Act that formed the backdrop for Section 195 have been repealed or substantially amended. The ban they once embodied has been replaced with Section 141(a)'s express authorization of sampling in the decennial census. Indeed, neither the House of Representatives nor the district court

has suggested that any current Census Act provision *other than* Section 195 restricts the Secretary's authority to use sampling for apportionment purposes. Nothing in logic or in the circumstances underlying Section 195's enactment suggests that Section 195—a provision intended as a partial *exemption* from a pre-existing statutory bar—should itself be regarded as an independent sampling prohibition now that the original statutory barriers have been replaced with an unqualified grant of authority to utilize sampling.

1. Section 195 in its original form was part of a larger legislative package that was introduced in the House of Representatives at the request of the Secretary of Commerce. See *Amendment of Title 13, United States Code, Relating to Census: Hearing Before the House Comm. on Post Office and Civil Service on H.R. 7911, 85th Cong., 1st Sess. 4 (1957) (1957 Hearing)*. The Commerce Department's Statement of Purpose and Need explained (*id.* at 7-8):

The use of sampling procedures would be authorized by the proposed new section 195. It has generally been held that the term "census" implies a complete enumeration. Experience has shown that some of the information which is desired in connection with a census could be secured efficiently through a sample survey which is conducted concurrently with the complete enumeration of other items; that in some instances a portion of the universe to be included might be efficiently covered on a sample rather than a complete enumeration basis and that under some circumstances a sample enumeration or a sample census might be substituted for a full census to the advantage of the Government. This section, in combination with [new] section 193, would give recognition to these facts and provide the necessary authority to the Secretary to permit the use of sampling when he believes that it would be advantageous to do so.

Thus, Section 195 was intended to increase the Secretary's flexibility by authorizing him to employ sampling techniques that would have been inconsistent with prior law. The Department of Commerce believed that then-existing law barred the use of sampling, and it did not propose to have that bar lifted with respect to "the determination of population for purposes of apportionment." Section 195 did not, however, *itself* impose a new, freestanding prohibition on the use of sampling in the apportionment process.<sup>17</sup>

The committee reports accompanying the bill that included the original Section 195 are fully consistent with the foregoing analysis. The Senate Report states that Section 195 "gives the Secretary authority to use sampling in connection with censuses except for the determination of the population for apportionment purposes. The proper use of sampling methods can result in substantial economies in census taking." S. Rep. No. 698, 85th Cong., 1st Sess. 3 (1957). The House Report discusses Section 195 in somewhat greater detail:

Section 195 provides that the Secretary of Commerce may authorize the use of the statistical method known as sampling in carrying out the purposes of title 13, if he

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<sup>17</sup> Thus, the original version of Section 195 was identical in practical effect to a hypothetical statute providing as follows: "Section 195(a): The Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title. Section 195(b): Subsection (a) shall not apply to the determination of population for apportionment purposes."

That an exception to an express authorization need not be construed to impose an independent prohibition may be demonstrated by considering the following hypothetical radio announcement, issued on a snowy morning: "*Except for employees at levels GS-15 and above, federal employees in the D.C. area may remain at home today.*" An employee at the GS-15 level who had previously received permission to take annual leave on that day would not construe the italicized language as negating the prior authorization. Rather, the proviso would simply make clear that employees at levels GS-15 and above could not rely on the announcement itself as a source of permission to remain home from work.

deems it appropriate. However, section 195 does not authorize the use of sampling procedures in connection with apportionment of Representatives.

The purpose of section 195 in authorizing the use of sampling procedures is to permit the utilization of something less than a complete enumeration, as implied by the word "census," when efficient and accurate coverage may be effected through a sample survey. Accordingly, except with respect to apportionment, the Secretary of Commerce may use sampling procedures when he deems it advantageous to do so.

H.R. Rep. No. 1043, 85th Cong., 1st Sess. 10 (1957) (1957 House Report). Because the predicate for the legislative initiative was the Commerce Department's understanding that then-existing law forbade the use of sampling, the effect of Section 195's opening proviso was that sampling for apportionment purposes *remained* unlawful. Nothing in the committee reports suggests, however, that Congress regarded the proviso as establishing a new, independent legal barrier to the use of sampling in apportioning Representatives.

2. As explained above, the Commerce Department's request for the enactment of Section 195 was based on its view that existing law prohibited the use of sampling. The Department and the House Committee regarded that prohibition as implicit in the statutory term "census." See *1957 Hearing* at 7; 1957 House Report at 10; see pp. 33, 35, *supra*.<sup>18</sup> At the time Section 195 was enacted, moreover, the

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<sup>18</sup> Before the 1957 Census Act amendments were enacted, 13 U.S.C. 141 required the Secretary to "take a census of population, agriculture, irrigation, drainage, and unemployment in each State, the District of Columbia, Alaska, Hawaii, and Puerto Rico" in the year 1960 and every ten years thereafter. 13 U.S.C. 141 (Supp. IV 1952). The 1957 amendments divided Section 141 into subsections (a) and (b); added the requirement that the census be taken as of April 1 of the census year; and



Census Act provided that "[e]ach enumerator shall visit personally each dwelling house in his subdivision, and each family therein, and each individual living out of a family in any place of abode, and by inquiry made of the head of each family, or of the member thereof deemed most competent and trustworthy, or of such individual living out of a family, shall obtain every item of information and all particulars required for any census or survey." 13 U.S.C. 25(c) (Supp. IV 1952). That provision would have effectively barred the use of any sampling methodology that did not involve a personal visit to every residence.<sup>19</sup>

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directed the Secretary to report state-level population figures to the President within eight months after the census date. 13 U.S.C. 141 (1958).

<sup>19</sup> It is by no means clear that the understanding of the term "census" reflected in the Commerce Department's 1957 Statement of Purpose and Need would have prohibited the use of sampling in the manner planned for the 2000 decennial census—i.e., as a *supplement* to traditional enumeration techniques. The Statement of Purpose and Need explained that "[i]t has generally been held that the term 'census' implies a complete enumeration," and it used the term "sample census" in contradistinction to "full census." 1957 *Hearing* at 7. A census that employed sampling techniques to enhance the accuracy of the count after good-faith efforts to contact all residents directly might well have been regarded as a "complete enumeration" or "full census." Sampling might therefore have been permissible even under pre-1957 law, so long as it was preceded by a good-faith effort to contact directly each individual living within the country.

For essentially the same reason, sampling used as a supplement to traditional enumeration techniques might also have been consistent with the purpose of former Section 25(c), which directed each enumerator to "visit personally" every residence within his subdivision. Former Section 25(c) further provided that "[i]n case no person is found at" the residence, "the census employee may obtain the required information as nearly as may be practicable from the families or persons living nearest to such place of abode who may be competent to answer such inquiries." 13 U.S.C. 25(c) (1952 Supp. IV). Even if sampling efforts were preceded by personal visits to all known residences, it might have been argued that the final sentence of former Section 25(c) implicitly precluded alternative methods of obtaining census information. Section 25's caption indicated, however, that that Section was intended to prescribe the duties of individual enumerators in the field. A requirement that individual enumerators seek to procure reliable information from competent neighbors need not have

The Census Act provisions that would previously have restricted the use of sampling, however, no longer exist in their prior form. Congress repealed former Section 25(c) in 1964, thereby eliminating the requirement that census information be collected through in-person visits to individual residences. See Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737.<sup>20</sup> And any restriction on sampling that Section 141(a)'s use of the word "census," standing alone, might formerly have implied was eliminated by the 1976 amendments to the Census Act. Those amendments revised Section 141(a) to authorize the Secretary to conduct the "decennial census of population"—the census used to determine the apportionment of Representatives among the States—"in such form and content as he may determine, including the

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been understood to foreclose still *further* efforts by other Census Bureau officials to supplement the enumerators' work in order to arrive at the most accurate population counts practicable. The Bureau's plan for the 2000 census does not involve efforts to "visit personally" every residence in the country, since that requirement was eliminated in 1964. See p. 37, *infra*. The Bureau will attempt, however, to distribute questionnaires by mail to all known households in the country, see p. 6, *supra*; note 20, *infra*, and will utilize sampling only as a supplement to those direct contacts.

<sup>20</sup> The committee reports accompanying the 1964 Act reflect an expectation that the distribution of questionnaires by mail would replace in-person visits as the predominant means of collecting census information. See S. Rep. No. 1474, 88th Cong., 2d Sess. (1964); H.R. Rep. No. 373, 88th Cong., 1st Sess. (1963). The text of the Census Act does not, however, direct the Secretary to employ any particular methodology in collecting the pertinent information. To the contrary, the Act in its current form broadly authorizes the Secretary to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a).

In any event, the Census Bureau's plan for the 2000 census includes extensive efforts to distribute questionnaires by mail to as high a percentage of the population as possible. See p. 6, *supra*. Neither the text of the 1964 Act nor the committee reports accompanying it reflect any congressional expectation regarding the nature of the follow-up efforts that will be undertaken with respect to households that do not return their questionnaires.

use of sampling procedures." 13 U.S.C. 141(a); see pp. 25-27, *supra*.<sup>21</sup>

3. The district court's statutory analysis was substantially driven by its belief that the 1976 amendment to Section 195, which changed the word "may" to "shall," would have been an "oblique" (J.S. App. 58a) or "indirect" (*id.* at 59a) means of eliminating the earlier prohibition on the use of sampling for apportionment purposes. But once it is understood that the earlier prohibition was imposed by other Census Act provisions that *predated* Section 195, rather than by Section 195 itself, the error in the court's analysis becomes apparent. There is nothing remotely oblique or indirect about the manner in which Congress dealt with those pre-existing barriers to sampling. Congress repealed former Section 25(c) entirely in 1964. And in 1976, when it amended Section 195 to its present form, Congress simultaneously amended Section 141—the statutory provision dealing specifically with the decennial census of population—to vest the Secretary with express authority to utilize "sampling procedures." 13 U.S.C. 141(a).<sup>22</sup>

<sup>21</sup> The district court's misunderstanding of Section 195's original purpose and effect may have resulted in part from the court's erroneous belief that "[p]rior to 1957, Congress did not identify any manner in which the decennial census was to be conducted." J.S. App. 48a. Based on the 1957 legislative history, the district court inferred that the Secretary was barred from using sampling in connection with the apportionment of Representatives immediately after the 1957 Act was passed. See *id.* at 48a-49a. Because the court failed to realize that the Secretary's choice of census methodologies was subject to significant pre-existing constraints, it may simply have assumed that the Secretary's inability (after the 1957 Act) to employ sampling in the apportionment context must have been the result of Section 195 itself.

<sup>22</sup> Although Section 195 in its original form did not itself prohibit the use of sampling for apportionment purposes, its language implied the presence of a pre-existing bar: there would have been little point in excluding apportionment from the original Section 195's authorization to use sampling if Congress had believed that sampling for apportionment purposes was already authorized. The 1976 amendment to Section 195, however, eliminated any such implication. As we explain above (see pp.

It is difficult to conceive of statutory language by which Congress could more clearly have eliminated the barriers to sampling that predated the original enactment of Section 195. The House of Representatives' statutory argument ultimately reduces to the claim that a provision designed as a partial *exemption* from a pre-existing ban should now be construed as an independent prohibition, even though the pre-existing barriers have been replaced with an affirmative authorization to use sampling. Nothing in logic or in the history of the Census Act supports that proposition.

### III. THE COMMERCE DEPARTMENT'S PLAN FOR THE 2000 CENSUS IS CONSISTENT WITH THE CONSTITUTIONAL REQUIREMENT THAT THE APPORTIONMENT OF REPRESENTATIVES AMONG THE STATES BE BASED UPON AN "ACTUAL ENUMERATION" OF THE POPULATION

The House of Representatives contended in the district court that the Secretary's plan for the 2000 census violates the constitutional requirement that Representatives be apportioned among the States on the basis of an "actual Enumeration," Art. I, § 2, Cl. 3—a requirement that the House construes as mandating a "headcount" (House Sum. Judg. Mem. 47, 51) of individuals "reckoned singly" (*id.* at 55). Although the district court declined to address that claim in light of its ruling on the statutory question (see J.S. App. 64a), this Court may wish to resolve the constitutional issue if it concludes that the suit satisfies the requirements of Article III and that the Secretary's plan for the 2000 census is consistent with the Census Act. For the reasons stated below, the House's constitutional claim lacks merit.

30-31, *supra*), it is perfectly logical for Congress to exempt apportionment from Section 195's generally applicable mandatory *directive* to use sampling, while simultaneously vesting the Secretary with *discretion* to use sampling for apportionment purposes if he believes that course to be warranted.



**A. The Text Of The Census Clause Does Not Require The Use Of Any Particular Method To Determine The Populations Of The Several States**

The constitutional requirement that Congress provide for an "actual Enumeration" of the population does not foreclose the use of statistical sampling mechanisms that the Census Bureau has concluded will enable it more accurately to determine the "respective Numbers" of "the several States." *The Oxford English Dictionary (OED)* gives as its primary definition of the word "enumeration" "[t]he action of ascertaining the number of something; *esp.* the taking [of] a census of population; a census." 3 *OED* at 227 (1933). The *OED* states that the word "enumeration" has been used in that manner since at least 1577. *Ibid.* The Secretary's plan for the 2000 census indisputably constitutes a means "of ascertaining the number of" persons within each State.

The *OED* also gives, as a secondary definition of the word "enumeration," "[t]he action of specifying seriatim, as in a list or catalogue." 3 *OED* at 227. The constitutional purpose of the decennial "enumeration," however, makes clear that the Framers did not use the word in that fashion. The sole constitutional function of the census is to determine the "respective Numbers" of the "several States" so that the reapportionment of Representatives may be effected in accordance with Article I, Section 2, Clause 3. See p. 27, *supra*. The only information that the census is constitutionally required to produce is the "whole number of persons in each State." U.S. Const. Amend. XIV, § 2. Although the government officials charged with conducting the census may compile a list of individual residents in the course of that undertaking, the list *qua* list has no constitutional significance.

Nor can it plausibly be contended that a "headcount" of individual residents "reckoned singly" is the constitutionally required *means* of determining the state-level population figures that are the ultimate objective of the decennial

census. The Census Clause does not require that the relevant numbers be determined through any particular methodology.<sup>23</sup> To the contrary, it vests Congress with extremely broad discretion, providing that the census is to be conducted "in such Manner as [Congress] shall by Law direct." U.S. Const. Art. I, § 2, Cl. 3. See *City of New York*, 517 U.S. at 19 ("The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and "there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides.").

**B. The Debates At The Constitutional Convention Indicate That The Framers Were Concerned With The Accuracy Of The State-Level Population Figures Determined Through The Census, Not With The Particular Methodology Used To Determine Those Figures**

In *Wesberry v. Sanders*, 376 U.S. 1, 10-14 (1964), this Court summarized the debates at the Constitutional Convention concerning the basis upon which the States' representation in Congress would be determined. Delegates from the larger States argued that each State's representation should be determined on the basis of population; those from the smaller States contended that each State should have an equal number of representatives. *Id.* at 10-11. The dispute was finally resolved by means of the Great Compromise, under which representation in the Senate was divided

<sup>23</sup> Article I, Section 9, Clause 4 of the Constitution provides that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." The phrase "Census or Enumeration herein before directed to be taken" can only be understood to refer to the "actual Enumeration" mandated by Article I, Section 2, Clause 3. Article I, Section 9, Clause 4's reference to a "Census or Enumeration" strongly indicates that the Framers understood the word "enumeration" to be synonymous with "census of population"—*i.e.*, the requirement that an "Enumeration" be conducted does not dictate the use of any particular methodology in determining the total population of each State.

evenly among the States, while the Members of the House were "apportioned among the several States . . . according to their respective Numbers." *Id.* at 13 (quoting U.S. Const. Art. I, § 2, Cl. 3). The Court in *Wesberry* further observed that "[t]he Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' an idea endorsed by Madison as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives." *Id.* at 13-14 (footnote omitted).

The debates at the Constitutional Convention contain no discussion of the specific methodology that would be used to ascertain the "respective Numbers" of "the several States." The drafting history of the Census Clause strongly indicates, however, that the Framers did not regard the word "Enumeration" as denoting any particular means of taking the census. Edmund Randolph made the first specific proposal, moving that the Convention adopt a provision stating "that in order to ascertain the alterations in the population & wealth of the several States the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every \_\_\_\_ years thereafter—and that the Legisl[ature] arrange the Representation accordingly." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 570-571 (1966 ed.) (Farrand). Subsequent versions of that provision consistently used the word "census"; none used the word "enumeration." See *id.* at 575, 594, 595, 600.

The Committee of Detail subsequently prepared a draft Constitution incorporating the resolutions passed by the Convention. Article IV, Section 4 of the draft Constitution directed Congress to "regulate the number of representatives by the number of inhabitants, according to the provisions herein after made, at the rate of one for every forty

thousand." 2 Farrand at 178. Article VII, Section 3, provided:

The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) *which number shall, within six years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct.*

*Id.* at 182-183 (emphasis added).<sup>24</sup> The effect of those provisions, taken together, was that Congress was directed to "regulate the number of representatives by the number of inhabitants, \* \* \* which number shall \* \* \* be taken in such manner as [Congress] shall direct." The relevant provisions of the Committee of Detail's draft imposed no restriction on the "manner" in which the "number" of each State's inhabitants would be "taken."

After receiving the Committee of Detail's report, the Convention devoted approximately one month to section-by-section analysis of the draft Constitution. See 2 Farrand at 190-564. The provisions set forth above were amended in minor respects not relevant to the question presented here. See *id.* at 219-223, 339, 350-351, 357. Those provisions were approved by the Convention in their amended form, and the revised draft Constitution was referred to the Committee of Style and Arrangement. See *id.* at 565, 566, 571. The phrase

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<sup>24</sup> Article IV, Section 3 of the draft Constitution prepared by the Committee of Detail set forth the temporary allocation of Representatives previously determined by the Committee of Eleven and approved by the Convention, see p. 45 & note 26, *infra*, and provided that the provisional allocation would govern "until the number of citizens and inhabitants shall be taken in the manner herein after described." 2 Farrand at 178.



"actual enumeration" first appeared in a new draft Constitution submitted to the Convention by the Committee of Style. See *id.* at 590. No delegate suggested that the Committee of Style's use of the word "enumeration" was intended to affect the scope of Congress's authority to conduct the census in the manner that it saw fit. Rather, the drafting history of the relevant constitutional provisions strongly indicates that the requirement to make an "Enumeration" simply directed Congress to determine the "Numbers" of persons within the "several States."<sup>25</sup>

The fact that the Census Clause refers to an "actual" enumeration also does not suggest that the determination of

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<sup>25</sup> This Court has recognized that "the Committee of Style had no authority from the Convention to alter the meaning" of the draft Constitution submitted for its review and revision. *Nixon v. United States*, 506 U.S. 224, 231 (1993); accord *Powell v. McCormack*, 395 U.S. 486, 538-539 (1969). That does not mean that changes made by the Committee of Style should be ignored. It does suggest, however, that in construing ambiguous provisions of the Constitution in its final form, the Court "must presume that the Committee's reorganization or rephrasing accurately captured what the Framers meant in their unadorned language." *Nixon*, 506 U.S. at 231. The phrase "actual Enumeration" should therefore be construed in a manner that renders it consistent with the language previously approved by the Convention, which stated that the "number" of persons within each State "shall \* \* \* be taken in such manner as the said Legislature shall direct." 2 Farrand at 183, 571.

The drafting history of the Census Clause does suggest one possible explanation for the Framers' decision to use the word "enumeration" rather than the word "census." Edmund Randolph's initial proposal was that a periodic "census" be taken "in order to ascertain the alterations in the population & wealth of the several States." 1 Farrand at 570 (emphasis added); compare 2 *OED* at 219 (listing as first definition of "census" "[t]he registration of citizens and their property in ancient Rome for purposes of taxation"). After considerable debate, however, the delegates decided that the apportionment of seats in the House of Representatives should be based on population alone. See 1 Farrand at 606; *Weasberry*, 376 U.S. at 14 & n.33. The word "enumeration"—like the Committee of Detail's directive that the "number" of each State's inhabitants "shall \* \* \* be taken" at least once in every ten-year period—might have been thought to convey more unambiguously than the word "census" that representation was to be based solely on population.

state-level population figures must be based exclusively on a "headcount" of identified individuals. Rather, the word "actual" was used to distinguish the permanent basis for apportioning Representatives from the temporary allocation set forth in the Census Clause. See U.S. Const. Art. I, § 2, Cl. 3 (stating that until the first "enumeration" has been conducted, "the State of New Hampshire shall be entitled to chuse three [Representatives], Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three"). Delegates at the Constitutional Convention used the phrase "actual census" in contradistinction to the provisional apportionment of Representatives established by the Census Clause. See 1 Farrand 602 (Oliver Ellsworth stated that the allocation of taxes on the basis of the provisional apportionment "will be unjust until an actual census shall be made"); *ibid.* (George Mason "doubted much whether the conjectural rule which was to precede the census, would be as just, as it would be rendered by an actual census").<sup>26</sup> Read in the context of the

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<sup>26</sup> The provisional allocation of Representatives set forth in Article I, Section 2, Clause 3 was undertaken by a Committee of Eleven composed of one delegate from each State then in attendance, which revised somewhat an earlier allocation drafted by a Committee of Five. See 1 Farrand at 559, 562-563. After some debate, that apportionment was agreed to by a vote of 9-2. *Id.* at 570. Members of the Committee of Eleven made clear that their allocation of Representatives was not based solely on estimates of the States' existing populations. See *id.* at 566 (Rufus King defends the allocation of three Representatives to New Hampshire in part on the ground that its population "may be expected to increase fast"); *id.* at 567, 584 (Gouverneur Morris states that "[p]roperty ought to have its weight" in apportioning Representatives, and asserts that the use of wealth as a factor "was followed in part by the [Committee of Eleven] in the apportionment of Representatives yesterday reported to the House"); *id.* at 587 (Roger Sherman states that "Georgia had more" representation under the provisional allotment than its current population would warrant, "but the rapid growth of that State seemed to justify it").

Census Clause as a whole, and of the debates surrounding its adoption by the Constitutional Convention, the reference to an "actual Enumeration" means only that the apportionment of Representatives must be based on a systematic effort to determine the actual number of persons within each State.<sup>27</sup>

Finally, construing the phrase "actual Enumeration" to mandate use of a particular census methodology would subvert the purposes underlying Article I, Section 2. The requirements that Representatives be chosen "by the People of the several States" (U.S. Const. Art. I, § 2, Cl. 1), and that they be apportioned among the States "according to their respective Numbers" (U.S. Const. Art. I, § 2, Cl. 3), reflect "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Wesberry*, 376 U.S. at 18; see also *Montana*, 503 U.S. at 463 (referring to "[t]he polestar of equal representation"); *Franklin*, 505 U.S. at 804, 806 ("constitutional goal of equal representation").<sup>28</sup> The decen-

<sup>27</sup> The Act of Congress providing for the first decennial census began by stating "[t]hat the marshals of the several districts of the United States shall be, and they are hereby authorized and required to cause the number of the inhabitants within their respective districts to be taken; omitting in such enumeration Indians not taxed, and distinguishing free persons, including those bound to service for a term of years, from all others." Act of Mar. 1, 1790, ch. 2, § 1, 1 Stat. 101. That language suggests that the First Congress regarded the concept of conducting an "enumeration" as synonymous with that of "caus[ing] the number of the inhabitants \* \* \* to be taken." As we explain below, see pp. 47-48, *infra*, the manner in which the first decennial census was conducted did not conform to the House of Representatives' view that the Census Clause requires a "headcount" of individuals "reckoned singly."

<sup>28</sup> The requirement that a new "Enumeration" be conducted within every ten-year period, see U.S. Const. Art. I, § 2, Cl. 3, was intended to further the goal of equal representation for equal numbers of people by ensuring that the apportionment of Representatives would continue to correspond to the "respective Numbers" of the "several States." The delegates to the Convention anticipated that westward migration would substantially alter the distribution of the country's population. They wished to avoid replicating the English practice of "rotten boroughs" that

nial census can fulfill that purpose only to the extent that it accurately determines the relative population shares of the individual States. The rule proposed by the House of Representatives, however, would bar Congress from employing any enumerative methodology other than a "headcount," no matter how broad the consensus within Congress and the expert community that other census-taking techniques would produce more accurate population figures. Nothing in the text, history, or purposes of the Census Clause supports that result.

### C. The House Of Representatives' Interpretation Of The "Actual Enumeration" Requirement Is Inconsistent With Historical Practice

The House of Representatives' contention that the "actual Enumeration" requirement mandates a "headcount" of individuals "reckoned singly" cannot be reconciled with historical practice. From the time of the First Congress, the conduct of the decennial census has routinely involved techniques designed to obtain and use reliable information concerning the *aggregate* number of persons residing at particular locations, rather than simply attempts to locate and count identified individuals.

resulted from the legislature's refusal to reapportion itself in light of population shifts. See *Wesberry*, 376 U.S. at 14; 1 Farrand at 584 (James Madison states that "[t]he power [in England] had long been in the hands of the boroughs, of the minority; who had opposed & defeated every reform which had been attempted."). Thus, George Mason defended the requirement of a periodic census by arguing that "[a]s soon as the Southern & Western population should predominate, which must happen in a few years, the power [would] be in the hands of the minority, and would never be yielded to the majority, unless provided for by the Constitution." *Id.* at 586. See also *id.* at 592 (Charles Cotesworth Pinckney "foresaw that if the revision of the census was left to the discretion of the Legislature, it would never be carried into execution"); *id.* at 594 (Edmund Randolph notes the danger "that the ingenuity of the Legislature may evade (or pervert the rule so as to) perpetuate the power where it shall be lodged in the first instance").



The Act providing for the 1790 decennial census stated that each "assistant" was to return to the appropriate United States marshal a schedule identifying all heads of households within the assistant's district, together with the number of persons in each household falling within each of five categories (free white males of sixteen years and upwards, free white males under sixteen years, free white females, all other free persons, and slaves). Act of Mar. 1, 1790, ch. 2, § 1, 1 Stat. 101-102. Nothing in the Act required the marshals or their assistants to report or record individual names. Nor did the Act specify the manner in which the relevant information was to be obtained, though it did require "each and every person more than sixteen years of age" to furnish accurate information if questioned by an assistant. § 6, 1 Stat. 103. Indeed, it was not until the seventh decennial census in 1850 that the government began to record the names of individuals other than heads of households. See S. Doc. No. 194, 56th Cong., 1st Sess. 47 (1900).

As the *Report to Congress* explains, moreover,

Census 2000 will not be the first time that the Census Bureau has used statistical methods to correct for problems in physical enumeration and to provide a more accurate final result. Since at least 1940, statistical imputation has been used when an enumerator knew that a housing unit was occupied, but could not obtain information on the number of people living in that unit. In 1980, statistical imputation raised the physical enumeration total by 761,000 people. The number and rate of people imputed in the 1990 Census was only 53,590. Automated data control systems and field procedures may have discouraged enumerators from turning in incomplete questionnaires. In 1970, the Census Bureau used sampling to impute people to addresses that had initially been assumed vacant. The sample of 13,456 housing units initially presumed "vacant" found that 11.4

percent of them should be reclassified as "occupied." The National Vacancy Check added 1,068,882 people, or 0.5 percent of the total, to the 1970 Census.

J.A. 81-82.<sup>29</sup>

We do not suggest that the statistical sampling mechanisms projected for use in the 2000 census are indistinguishable from techniques used in the past. To the contrary, the Commerce Department's decision to make increased use of sampling was explicitly based on its determination that "[c]hanges in American society dictate that census-taking methods must change." J.A. 41. The historical record makes clear, however, that the determination of population for purposes of apportionment has routinely involved methodologies that cannot be described as a "headcount" of individuals "reckoned singly."

<sup>29</sup> The Census Bureau has used a variety of techniques to determine the number of persons residing in particular housing units when the Bureau was unable to contact directly any individual living therein. The Bureau attempts to obtain the relevant information from a neighbor, a practice that for much of the 20th Century was specifically authorized by the Census Act. See 13 U.S.C. 25(c) (Supp. IV 1952), quoted at note 19, *supra*. Where such inquiries are unavailing, the Bureau has employed the "hot deck" method of imputation, in which information concerning a unit for which data are unavailable is imputed from the unit processed immediately beforehand (generally a neighboring unit). See House Sum. Judg. Exh. 3, at 4; *id.* Exh. 8, at 5-7. As the *Report to Congress* explains, the Bureau made significant use of sampling in conducting the 1970 census, when it discovered that a substantial number of housing units initially classified as vacant were in fact occupied. The Bureau then surveyed a sample of units classified as vacant and extrapolated the results of its surveys to all of the "vacant" units nationwide. The effect of the National Vacancy Check was to add over 1,000,000 persons to the national population totals. See J.A. 82; Commerce Dep't Exh. 4, at 7-6, 8-26 to 8-30.

**CONCLUSION**

The judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. In the alternative, the judgment of the district court should be reversed.

Respectfully submitted.

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**APPENDIX**

Article I, Section 2, Clause 3 of the United States Constitution provides as follows:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Section 2 of the Fourteenth Amendment to the United States Constitution provides as follows:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants



of such State, being twenty-one years of age,<sup>1</sup> and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 2a of Title 2, United States Code, provides as follows:

**Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk**

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of

<sup>1</sup> See Amendment XIX and section 1 of amendments XXVI.

Representatives to which such State is entitled under this section. In case of a vacancy in the office of clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

Section 141 of Title 13, United States Code, provides as follows:

**Population and other census information**

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with

respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1) If-

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and



(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census—

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.

Section 195 of Title 13, United States Code, provides as follows:

#### **Use of sampling**

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Section 209 of the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2480-2483 (1997), provides as follows:

**(a) Congress finds that—**

(1) it is the constitutional duty of the Congress to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and laws of the United States;

(2) the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States;

(3) section 2 of the 14th article of amendment to the Constitution clearly states that Representatives are to be “apportioned among the several States according to their respective numbers, counting the whole number of persons in each State”;

(4) article I, section 2, clause 3 of the Constitution clearly requires an “actual Enumeration” of the population, and section 195 of title 13, United States Code, clearly provides “Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as ‘sampling’ in carrying out the provisions of this title.”;

(5) the decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs;

(6) it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States;

(7) the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census;

(8) the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted; and

(9) Congress is committed to providing the level of funding that is required to perform the entire range of constitutional census activities, with a particular emphasis on accurately enumerating all individuals who have historically been undercounted, and toward this end, Congress expects—

(A) aggressive and innovative promotion and outreach campaigns in hard-to-count communities;

(B) the hiring of enumerators from within those communities;

(C) continued cooperation with local government on address list development; and

(D) maximized census employment opportunities for individuals seeking to make the transition from welfare to work.

(b) Any person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members



in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

(c) For purposes of this section—

(1) the use of any statistical method as part of a dress rehearsal or other simulation of a census in preparation for the use of such method, in a decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress shall be considered the use of such method in connection with that census; and

(2) the report ordered by title VIII of Public Law 105-18 and the Census 2000 Operational Plan shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding.

(d) For purposes of this section, an aggrieved person (described in subsection (b)) includes—

(1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action;

(2) any Representative or Senator in Congress; and

(3) either House of Congress,

(e)(1) Any action brought under this section shall be heard and determined by a district court of three judges in accordance with Section 2284 of title 28, United States Code. The chief judge of the United States court of appeals for each circuit shall, to the extent practicable and consistent

with the avoidance of unnecessary delay, consolidate, for all purposes, in one district court within that circuit, all actions pending in that circuit under this section. Any party to an action under this section shall be precluded from seeking any consolidation of that action other than is provided in this paragraph. In selecting the district court in which to consolidate such actions, the chief judge shall consider the convenience of the parties and witnesses and efficient conduct of such actions. Any final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under this section may be issued by a single Justice of the Supreme Court.

(2) It shall be the duty of a United States district court hearing an action brought under this section and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any such matter.

(f) Any agency or entity within the executive branch having authority with respect to the carrying out of a decennial census may in a civil action obtain a declaratory judgment respecting whether or not the use of a statistical method, in connection with such census, to determine the population for the purposes of the apportionment or redistricting of Members in Congress is forbidden by the Constitution and laws of the United States.

(g) The Speaker of the House of Representatives or the Speaker's designee or designees may commence or join in a civil action, for and on behalf of the House of

Representatives, under any applicable law, to prevent the use of any statistical method, in connection with the decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress. It shall be the duty of the Office of the General Counsel of the House of Representatives to represent the House in such civil action, according to the directions of the Speaker. The Office of the General Counsel of the House of Representatives may employ the services of outside counsel and other experts for this purpose.

(h) For purposes of this section and section 210—

(1) the term “statistical method” means an activity related to the design, planning, testing, or implementation of the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add or subtract counts to or from the enumeration of the population as a result of statistical inference; and

(2) the term “census” or “decennial census” means a decennial enumeration of the population.

(i) Nothing in this Act shall be construed to authorize the use of any statistical method, in connection with a decennial census, for the apportionment or redistricting of Members in Congress.

(j) Sufficient funds appropriated under this Act or under any other Act for purposes of the 2000 decennial census shall be used by the Bureau of the Census to plan, test, and become prepared to implement a 2000 decennial census, without using statistical methods, which shall result in the percentage of the total population actually enumerated being as close to 100 percent as possible. In both the 2000 decennial census, and any dress rehearsal or other simulation made in preparation for the 2000 decennial

census, the number of persons enumerated without using statistical methods must be publicly available for all levels of census geography which are being released by the Bureau of the Census for: (1) all data releases before January 1, 2001; (2) the data contained in the 2000 decennial census Public Law 94-171 data file released for use in redistricting; (3) the Summary Tabulation File One (STF-1) for the 2000 decennial census; and (4) the official populations of the States transmitted from the Secretary of Commerce through the President to the Clerk of the House used to reapportion the districts of the House among the States as a result of the 2000 decennial census. Simultaneously with any other release or reporting of any of the information described in the preceding sentence through other means, such information shall be made available to the public on the Internet. These files of the Bureau of the Census shall be available concurrently to the release of the original files to the same recipients, on identical media, and at a comparable price. They shall contain the number of persons enumerated without using statistical methods and any additions or subtractions thereto. These files shall be based on data gathered and generated by the Bureau of the Census in its official capacity.

(k) This section shall apply in fiscal year 1998 and succeeding fiscal years.



OCT 6 1998

CLERK

No. 98-404

In The  
Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT  
OF COMMERCE, ET AL.,

*Appellants,*

vs.

UNITED STATES HOUSE  
OF REPRESENTATIVES, ET AL.,

*Appellees.*

On Direct Appeal From The United States  
District Court For The District Of Columbia

BRIEF ON THE MERITS OF CALIFORNIA  
LEGISLATURE, ET AL.

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California, et al.*

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SUPREME COURT, U.S.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Census Act prohibits the Secretary of Commerce from using statistical sampling to ensure that the year 2000 census for apportionment purposes will be as accurate as it is within his power to make it.

2. Whether Article I, Section 2, Clause 3 of the United States Constitution prohibits the Secretary of Commerce from using statistical sampling to conduct the decennial census for apportionment purposes when there is no dispute that sampling will provide a more accurate result.



**PARTIES TO THE PROCEEDING  
IN THE COURT BELOW**

The parties to the District Court proceedings are the following:

**Plaintiff:**

United States House of Representatives.

**Defendants:**

The United States Department of Commerce; William M. Daley, in his capacity as Secretary of the United States Department of Commerce; Bureau of the Census; James F. Holmes, in his capacity as Acting Director of the Bureau of the Census.

**Intervenors as Defendants:**

**Legislature of the State of California, et al.:** Legislature of the State of California; the California Senate; John Burton, individually and as President Pro Tempore of the California Senate; the California Assembly; Antonio Villaraigosa, individually and as Speaker of the California Assembly.

**Richard A. Gephardt, et al.:** Richard A. Gephardt, Danny K. Davis, Juanita Millender-McDonald, Lucille Roybal-Allard, Louise M. Slaughter, Bennie G. Thompson, individually and in their official capacities as Members of the United States House of Representatives.

**City of Los Angeles, et al.:** City of Los Angeles; City of New York; County of Los Angeles; City of Chicago; City and County of San Francisco; Miami-Dade County; City of Inglewood; City of Houston; City of San Antonio;

**PARTIES TO THE PROCEEDING  
IN THE COURT BELOW - Continued**

City and County of Denver; City of Long Beach; City of San Jose; City of Stamford; City of Oakland; City of Cudahy; County of Santa Clara; County of San Bernardino; County of Alameda; County of Riverside; State of New Mexico; U.S. Conference of Mayors; League of Women Voters of Los Angeles; Carolyn Maloney, Christopher Shays, Tom Sawyer, Rod Blagojevich, Bobby Rush, Luis Gutierrez, John Conyers, Jr., Jose Serrano, Cynthia McKinney, Charles Rangel, Donald Payne, Howard Berman, Xavier Beccera, Loretta Sanchez, Julian Dixon, Henry Waxman, Maxine Waters, Esteban Torres, Sheila Jackson Lee, individually and in their official capacities as Members of the United States House of Representatives; City of Detroit; City of Bell; City of Gardena; City of Huntington Park; Members of Congress Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez and Carlos Romero-Barcelo.

**National Korean American Service & Education Consortium, Inc., et al.:** National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kum; Adeline M.L. Yoong; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra.

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*United States House of Representatives v. United States Department of Commerce*, 11 F. Supp.2d 76, 1998 WL 556342 (D.D.C., Aug. 24, 1998)

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**STATEMENT OF JURISDICTION IN THIS COURT**

This Court has jurisdiction pursuant to section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998 ("Appropriations Act of 1998"), Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2440, 2482 (1997). The text of this provision is set forth in the Appendix hereto at App. 6.

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**CONSTITUTIONAL PROVISIONS  
AND STATUTES INVOLVED**

The constitutional provisions and statutes involved herein, whose text is set forth in the Appendix hereto are as follows:

U.S. Constitution, Article I, Section 2, Clause 3

U.S. Constitution, Article I, Section 9, Clause 4

U.S. Code, Title 13, Section 141

U.S. Code, Title 13, Section 195

Pub. L. No. 105-119, 111 Stat. 2440, 2482 (1997),  
Section 209(e)(1).

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## STATEMENT OF THE CASE

The Great Compromise established a system of federal government in which the small states were each guaranteed two senators and at least one representative and the large states were guaranteed that, in all other respects, representation in the Congress would be based upon proportionality. Article I, Section 2 provides that this proportional representation shall be according to each state's population. U.S. Const. art I, § 2. The constitutional commitment to these values has been reflected in continuing efforts to produce an accurate census. To that end, the Census Bureau and the Department of Commerce, to whom the decennial census has been entrusted, have over the years tested and then implemented an array of conventional and unconventional techniques, technologies and strategies for improving census accuracy. U.S. Department of Commerce, Bureau of the Census, *Report to Congress - The Plan for Census 2000* (August 1997) ("*Census 2000 Report*"), Joint Appendix ("*Joint App.*") 46-47; see generally Harvey Choldin, *Looking for the Last Percent: The Controversy Over the Census Undercounts* (1994); Margo J. Anderson, *The American Census: A Social History* (1988). These efforts have been all the more important since the 1960s with the advent of decennial redistricting requirements,<sup>1</sup> civil rights legislation<sup>2</sup> and the increased use of census figures for economic and social planning and for allocation of federal funds. See generally *Census 2000 Report*, Joint App. 40, 46;

<sup>1</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>2</sup> See, e.g., Voting Rights Act, 42 U.S.C. § 1973 (1994).

National Research Council, *Modernizing the U.S. Census*, National Academy Press, Washington, D.C. 1995 at 24-26, 259-339; Choldin, *supra*, at 26-29; Anderson, *supra*, at 213-14.

For the past several decades, persistent and prominent criticism has been directed at the significant undercount that has marked the decennial census. See Choldin, *supra*, at 1-3, 30-33, 84-118; Anderson, *supra*, at 221-24. Any significant undercount is of concern, but the decennial census undercount is of particular concern because it is dramatically disproportionate among different states, sectors in the society and racial and ethnic groups. This differential undercount thus seriously compromises the values of equal representation and one-person-one-vote. *Census 2000 Report*, Joint App. 49.

From 1940 to 1980 the Census Bureau was able to improve the accuracy of the census each decade. *Census 2000 Report*, Joint App. 40-41. This was achieved in large part by shifting from door-to-door enumerators to mail-out-mail-back procedures whereby households submit their own count, by innovative methods such as the Postal Vacancy Check which uses sample neighboring households to impute the population of units that have been labeled vacant by the Post Office but in fact appear to be occupied, by creative community outreach and response campaigns, and by increased funding and intensified efforts using conventional methods of counting. See *id.*, Joint App. 46-47; see also *Modernizing the U.S. Census* at 19-21, 228-38; Choldin, *supra*, at 65.

By 1990, the efficacy of these methods had reached its limit, and, despite the fact that it "surpassed all previous

censuses in terms of design, execution and resources used, the 1990 census took a large step backwards in terms of accuracy." *Census 2000 Report*, Joint App. 40; see also *id.*, Joint App. 47-52. The census undercount in 1990 was 50 percent greater than the rate in 1980. *Id.*, Joint App. 48. In the 1990 census, children were much more likely to be undercounted than adults, and renters, particularly in rural areas, were more likely to be missed than homeowners. *Id.*, Joint App. 48-49. The 1990 undercount rates were six times larger for African Americans than for non-Hispanic Whites, seven times larger for Hispanics and three times larger for Asians and Pacific Islanders; nearly one out of every eight American Indians living on reservations was not counted. *Id.*, Joint App. 49; *Modernizing the U.S. Census* at 43, note 2; see also 1991 Commerce Decision, 56 Fed. Reg. 33582 (1991).

In California, which has substantial populations of Hispanics, Asians and Pacific Islanders, the 1990 census failed to account for approximately 834,000 people, roughly 2.8 percent of the state's 1990 population compared to a nationwide rate of 1.4 percent. Declaration of Geoffrey Long [filed below with California Legislative Parties' Consolidated Reply in Support of Intervention, April 24, 1998]. As a result, California lost one congressional seat and was forced to bear a disproportionate share of the costs of services because of the loss of millions of dollars in federal funding. *Id.*; *Modernizing the U.S. Census* at 38-40.

Since the 1970s, the Census Bureau and other experts in the field have been working on statistical techniques that could be used to correct the differential undercount.

See, e.g., *Programs to Reduce the Decennial Census Undercount*, Department of Commerce: Report to the House Committee on Post Office and Civil Service by the Comptroller General of the United States, GAO Rep. No. GGD-76-72, at 21-22 (May 5, 1976) ("1976 GAO Report") (reporting efforts in the 1970s); *Wisconsin v. City of New York*, 517 U.S. 1, 10 (1996) (reviewing efforts in the mid-1980s); see also Choldin, *supra*, at 119-33. The Census Bureau's initial plan for the 1990 census included statistical techniques somewhat like those planned for the 2000 census. Choldin, *supra*, at 119-36. Litigation was commenced in 1988 in an attempt to require statistical correction. See *City of New York v. Department of Commerce*, 739 F. Supp. 761 (E.D.N.Y. 1990). Ultimately, the Secretary of Commerce declined to use statistical sampling to correct the undercount on the grounds that, although it would improve the accuracy of the overall count, it would not improve the accuracy of the distributive count among the states, which was more important for apportionment purposes. 1991 Commerce Decision, 56 Fed. Reg. at 33583.<sup>3</sup> This Court unanimously upheld the Secretary's exercise of discretion. *Wisconsin*, 517 U.S. at 19-20.

In response to concerns over the 1990 census undercount, bipartisan legislation was passed by a unanimous Congress and signed by President Bush in 1991, directing the National Academy of Sciences to study the "means by which the Government could achieve the most accurate

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<sup>3</sup> As is discussed below, this concern has been resolved by changes in the statistical sampling procedures planned for the 2000 census.



population count possible." Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, § 2(a)(1), 105 Stat. 635, 635 (1991); see also *Census 2000 Report*, Joint App. 53. The congressional directive included instructions that the National Academy consider "the appropriateness of using sampling methods." Decennial Census Improvement Act of 1991, § 2(b)(1)(C). The National Academy, after extensive study, recommended that what is commonly known as statistical sampling be used in the 2000 census. It concluded that the "[d]ifferential undercount cannot be reduced to acceptable levels at acceptable costs without the use of integrated coverage measurement and the statistical methods associated with it." *Census 2000 Report*, Joint App. 53-55.

Based on the work and recommendations of the National Academy, its own internal studies, recommendations from several advisory committees, public meetings and congressional input, the Census Bureau developed a plan for the 2000 census that included the use of statistical sampling to supplement data obtained through traditional census methods. *Census 2000 Report*, Joint App. 42-43, 56-58. By the time this determination was reached, two important things had become clear. First, unlike the techniques rejected in 1990, the statistical sampling techniques available for the 2000 census will improve both overall and distributive accuracy: "At all geographic levels important to political representation and funds allocation, Census 2000 will provide more accurate results than physical enumeration alone." *Census 2000 Report*, Joint App. 44. Second, no matter how much money and effort are devoted to traditional methods, use

of those methods by themselves, without statistical sampling, cannot improve accuracy. *Modernizing the U.S. Census* at 3; *Census 2000 Report*, Joint App. 42, 49-52, 99, 121-23. As the National Academy Panel on Requirements put it:

It is fruitless to continue trying to count every last person with traditional Census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 Census using traditional methods, as it has in previous Censuses, will not lead to improved coverage or data quality.

*Census 2000 Report*, Joint App. 54.

After it became apparent that the Census Bureau planned to use statistical sampling as part of the 2000 census, an effort by the 105th Congress to prohibit the use of sampling failed when the President vetoed that legislation. Supplemental Appropriations Act, H.R. 1469, 105th Cong. tit. VIII(b)(1) (1997); 33 Weekly Comp. Pres. Docs. 846 (June 9, 1997). Subsequently, legislation was passed that did not include such a prohibition, but that authorized the House of Representatives and other parties to bring litigation testing their argument that pre-existing law or the Constitution already restrained the Census Bureau from using sampling techniques to ensure the accuracy of the census. Appropriations Act of 1998 §§ 209, 210, 111 Stat. at 2480-87. Congress granted original jurisdiction to three judge district courts with direct appellate review to this Court. *Id.* § 209(e)(1), 111 Stat. at 2482.

On February 20, 1998, at the direction of the Speaker of the House, this lawsuit was filed on behalf of plaintiff United States House of Representatives. The complaint

sought a declaration that the use of sampling to determine population for congressional apportionment purposes violates the Census Act, 13 U.S.C. §§ 1-307 (1990), Article I, Section 2, Clause 3 of the United States Constitution and the Fourteenth Amendment. Plaintiff further sought a permanent injunction preventing defendants from using sampling in the apportionment aspect of the 2000 census.

The suit named as defendants the Department of Commerce, the Secretary of Commerce, the Census Bureau and its Director. Members of Congress, the California Legislature and its leadership, certain states and local jurisdictions, as well as certain public interest groups, sought and were granted leave to intervene as defendants. See Parties to the Proceeding in the Court Below, *supra* at ii.

The federal defendants moved to dismiss on grounds of standing, ripeness, justiciability, separation of powers and failure to state a claim for relief. See Memorandum Opinion filed August 24, 1998 ("Mem. Opn."), Appendix to Jurisdictional Statement ("Juris. App.") 2a, 11a. The California Legislature and other intervenors filed their own motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiff's complaint failed to state a claim on which relief could be granted. See Mem. Opn., Juris. App. 2a. Plaintiff moved for summary judgment on the merits of the statutory and constitutional claims. See Mem. Opn., Juris. App. 2a, 45a-46a.

On August 24, 1998, the three-judge court filed its opinion, order and judgment denying the defendants' and intervenors' motions to dismiss and granting the

plaintiff's motion for summary judgment. The court ordered "that defendants are permanently enjoined from using any form of statistical sampling, including their program for nonresponse follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment." Juris. App. 67a. The court found that the Census Act prohibited the Census Bureau from using sampling and therefore did not find it necessary to reach the constitutional issues.

The federal defendants filed their notice of appeal on August 25, 1998. This Court noted probable jurisdiction in case number 98-404 on September 10, 1998, and, pursuant to a joint motion, ordered expedited briefing and oral argument. The California Legislature filed its notice of appeal on August 28, 1998, filed its Jurisdictional Statement on September 8 in case number 98-413, and filed its motion to consolidate the appeals and for expedited review on September 14, 1998. The California Legislature seeks review in this Court of the district court's ruling on the merits of the challenge to the Secretary's authority. It does not appeal the district court rulings on standing, ripeness, justiciability and separation of powers.

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#### SUMMARY OF THE ARGUMENT

Congress has delegated to the Department of Commerce "virtually unlimited discretion" in conducting the census. *Wisconsin*, 517 U.S. at 19. Under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny, therefore, the Department's reasonable interpretation of the Census Act is entitled to deference unless



Congress has "directly spoken to the precise question at issue" and "unambiguously expressed" a contrary intent. *Chevron*, 467 U.S. at 842-45.

When Congress was considering 1976 amendments to the Census Act it was aware the Bureau of the Census had extensively used sampling techniques in the 1970 census for all purposes, notwithstanding the language of 13 U.S.C. § 195, which provided that "except for the determination of population for apportionment purposes, the Secretary *may*, where he deems it appropriate, authorize the use of the statistical method known as 'sampling'. . . ." Act of Aug. 28, 1957, Pub. L. No. 85-207, sec. 14, § 195, 71 Stat. 481, 484 (1957) (emphasis added).

If Congress found the 1970 use of statistical sampling to improve the population count unacceptable, surely it would have said so. Instead, Congress added the language of section 141(a) explicitly authorizing the Secretary of Commerce to use sampling procedures as part of the decennial census and placing no restrictions on the Secretary's discretion to use those procedures:

The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. . . .

13 U.S.C. § 141(a).

At the same time, Congress raised the stakes with respect to the language of section 195. Where before, in areas other than apportionment the Secretary was

authorized to use sampling "where he deems it appropriate," Act of Aug. 28, 1957, sec. 14, § 195, the new language *required* the Secretary to use sampling if "feasible" in areas other than apportionment. 13 U.S.C. § 195. That change was accomplished by the change from "may where he deems it appropriate" to "shall, if he considers it feasible" in section 195. Thus the two sections are easily harmonized: for all purposes the Secretary *may* use sampling, 13 U.S.C. § 141(a), and the Secretary *must* use sampling at any time that it is "feasible" except for purposes of apportionment. *Id.* § 195. For purposes of apportionment, the Secretary is neither required to nor prohibited from using sampling, but may use it if, as here, he determines that he can do so with the level of confidence that the constitutional command for an "actual enumeration" requires.

Congress could, of course, have used more direct language, but in the absence of an unambiguous message to the contrary the default is that the Secretary has complete discretion to use sampling. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Where "the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction [particularly when that construction] so closely fits 'the design of the statute as a whole and . . . its object and policy.'" *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417-18 (1993) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)).

Nor does the call in Article I, Section 2, Clause 3 for an "actual enumeration" for apportionment purposes serve to deny the Secretary the discretion to use sampling techniques. Indeed, a review of the history of that section makes it clear that "actual enumeration" was in contrast to the "mere conjecture" and guesswork that were used for the first apportionment. See 1 *The Records of the Federal Convention of 1787*, 578 (Max Farrand ed., rev. ed. 1937). The Secretary's effort to secure the most accurate numbers possible is fully "consistent with the constitutional language and the constitutional goal of equal representation . . . ." *Wisconsin*, 517 U.S. at 19-20 (citation omitted). Just as the Secretary's decision not to adjust in 1990 "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," *id.* at 20, his decision that the state of the art is now such that statistical sampling is the most direct route to the constitutional goal may not be disturbed.

## ARGUMENT

### I. THE DEPARTMENT OF COMMERCE INTERPRETATION OF THE CENSUS ACT SHOULD BE SUSTAINED

Congress has delegated to the Department of Commerce "virtually unlimited discretion" in conducting the census. *Wisconsin*, 517 U.S. at 19; see also *Franklin v. Massachusetts*, 505 U.S. 788 (1992); 13 U.S.C. § 141(a). Under *Chevron*, and its progeny, therefore, the Department's reasonable interpretation of the Census Act is entitled to deference unless Congress has "directly spoken to the

precise question at issue" and "unambiguously expressed" a contrary intent. 467 U.S. at 842-45; see also *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 927, 938-39 (1998); *Auer v. Robbins*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 905, 909 (1997); *Smiley v. Citibank*, 517 U.S. 735, 739 (1996); *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 414 (1993); *Rust v. Sullivan*, 500 U.S. 173, 186-90 (1991); *National Labor Relations Bd. v. Iron Workers*, 434 U.S. 335, 350-52 (1990). It has not done so here.

#### A. Congress Has Not Expressed an Unambiguous Intent to Prohibit the Use of Sampling Contemplated Here

At the heart of this controversy are two provisions of the Census Act that address the use of sampling in the decennial census. 13 U.S.C. §§ 141(a) and 195. In 1976, Congress, in a single bill, amended both of these sections in a manner that is the source of contention here. Act of Oct. 17, 1976, Pub. L. No. 94-521, 90 Stat. 2459 (1976). Plaintiff contends that the statute absolutely prohibits the use of sampling to count the population for apportionment purposes. Defendants contend that the statute leaves such use to the discretion of the Secretary of Commerce.

The 1976 amendments to the Census Act, as they related to statistical sampling in the decennial census, did two things: First, section 141(a), which is the statutory authority for the Department of Commerce to conduct the decennial census, was amended by adding new language specifically authorizing the Secretary of Commerce to



take a decennial census "in such form and content as he may determine, *including the use of sampling procedures . . .*" 13 U.S.C. § 141(a) (emphasis added). At the same time, section 195 was amended to state that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary *shall*, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. § 195 (emphasis added). Prior to the 1976 amendments, section 195 had stated: "Except for the determination of population for apportionment purposes, the Secretary *may*, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." Act of Aug. 28, 1957, sec. 14, § 195, 71 Stat. at 484 (emphasis added).

Other parties to these proceedings will present the argument that the Census Act unequivocally authorizes the use of statistical sampling at issue here. At a minimum, however, these provisions of the Census Act, as amended in 1976, are certainly susceptible to that interpretation. This is evident from the disagreement among the lower courts<sup>4</sup> and among the branches of

<sup>4</sup> The interpretation advanced by the district court in this case is at odds with the views of numerous other courts that have addressed the Department's authority to use statistical sampling. See *City of New York v. Department of Commerce*, 34 F.3d 1114, 1124-25 (2nd Cir. 1994), *rev'd on other grounds*, *Wisconsin v. City of New York*, 517 U.S. 1 (1996); *City of New York v. Department of Commerce*, 739 F. Supp. 761, 767-68 (E.D.N.Y. 1990); *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1096 n.13 (S.D.N.Y. 1987); *Young v.*

government<sup>5</sup> as to the statute's proper interpretation. Cf. *Smiley v. Citibank*, 517 U.S. 735, 739 (1996) (ambiguity evident from dissenting opinions and conflicting rulings in the state courts). That the statute does not unambiguously forbid the use of statistical sampling is further demonstrated by the fact that Congress, without success, attempted to enact legislation in 1997 to prohibit the use of statistical sampling. H.R. 1469, tit. VIII(b)(1). If the Census Act already contained an unambiguously clear prohibition, the legislation would not have been necessary.

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*Klutznick*, 497 F. Supp. 1318, 1334-35 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, *Young v. Baldrige*, 455 U.S. 939 (1982); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D.Pa. 1980).

<sup>5</sup> The litigation position of the House is at odds both with the executive and with previous legislative statements. The executive branch has made its disagreement obvious not only through the Department of Commerce and the Census Bureau but also through an express statement in the President's veto message on H.R. 1469 in the 105th Congress. See 33 Weekly Comp. Pres. Docs. 846 (June 9, 1997). Additionally, the current interpretation of the House appears to be at odds with previous Congressional support for sampling methods. For example, in 1991, a bipartisan Congress directed a study to find ways to make the census more accurate, including the use of sampling. Decennial Census Improvement Act of 1991, §§ 2(a)(1), 2(b)(1)(C), 105 Stat. at 635. This congressional mandate and the time and expense involved in this study makes no sense if the Census Act clearly prohibited the use of sampling.

The absence of a clear congressional prohibition is further evidenced by the historical circumstances in which the 1976 amendments were adopted.

Most significantly, the 1970 census, which was in front of the Congressional oversight committee at the same time as the 1976 amendments to the Census Act, used sampling to improve the count for apportionment purposes and received no criticism at the time.<sup>6</sup> It was during the 1970 census that the Department began using the National Vacancy Check, also known as the Postal Vacancy Check, which became an established part of census procedures and has not been challenged here. *Census 2000 Report*, Joint App. 82; Bureau of the Census, *Effect of Special Procedures to Improve Coverage in the 1970 Census*, PHC(E)-6, at 11-12 (December 1974).<sup>7</sup> The Postal Vacancy Check uses neighboring sample households to

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<sup>6</sup> In *Wisconsin v. City of New York*, this Court found the 1970 sampling was different in kind and much smaller in scale than the sampling considered for the 1990 census. 517 U.S. at 22. Here the significance of the 1970 experience and the continued use since 1970 of the Postal Vacancy Check, which uses sampling to add to the population count, have different implications. The challenge to the Secretary's authority here does not permit distinctions based upon character and scale of sampling. The challenge here is not to some particular form of statistical sampling but to any use of statistical sampling for apportionment purposes. Thus, past use of statistical sampling and its approval by Congress, even on a much smaller scale, cannot be overlooked.

<sup>7</sup> Although plaintiff's interpretation of the Census Act throws the use of the National Vacancy Check in doubt, plaintiff has not challenged that part of the Census 2000 plan. Mem. Opn., Juris. App. 5a.

impute population figures and information about households that have been designated vacant but that seem to be occupied, despite the fact that their inhabitants cannot be located. *Id.*; 1976 GAO Report at 12. The 1970 census also used sampling as part of the post-enumeration check to account for population that the enumerators had missed in sixteen Southern states. *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 15-16; 1976 GAO Report at 12.

These sampling procedures added about 1.5 million people to the 1970 census. See *Census 2000 Report*, Joint App. 82; *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 2, 3; 1976 GAO Report at 12. The Census Bureau concluded that "[w]ithout this program, there would have been a significant deterioration in population coverage from 1960." *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 2.<sup>8</sup>

Between 1970 and 1976, when the Census Act was amended, the use and the effectiveness of sampling for purposes of the decennial census was repeatedly brought to Congress' attention. In 1971, for example, the Report of the Decennial Census Review Committee was submitted to the full Congress and published in the Congressional Record. 117 Cong. Rec. 29722 (Aug. 4, 1971). It summarized census improvement efforts, including the Postal Vacancy Check and the post-enumeration check, *id.* at

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<sup>8</sup> The vacancy check showed that nationally over 11 percent of the units initially assumed to be vacant should have been enumerated as occupied. *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 12; *Census 2000 Report*, Joint App. 82.



29726, and described the conduct of the census in laudatory terms as follows:

Planning and execution of the decennial census is carried on at a commendably high level of technical competence and with proper concern for comprehensiveness, accuracy, and economy. The procedures used have been refined and developed over time through a blend of experience, analytical examination of that experience, and imaginative innovation.

*Id.* at 29723.

The Census Bureau's 1976 report on the procedures used in the 1970 census made no bones about the fact that they included sampling and evaluated their effectiveness as follows:

- Evaluation studies . . . show that both steps were very effective in adding persons presumed to have been missed in the enumeration. The vacancy check had the greatest impact on the census count of any measurable coverage improvement program. Both programs are, however, subject to the qualification that they depended on imputation of persons not specifically identified in the field.

Bureau of the Census, *1970 Census of Population and Housing: Procedural History*, PHC(R)-1, at 7-6 (June 1976).<sup>9</sup>

<sup>9</sup> A 1974 Census Bureau Report on the efforts to improve coverage had similarly made it plain that the new procedures involved the use of sampling:

The second type [of improvement program] included a group of projects intended to locate households or

While Congress was considering the 1976 amendments to the Census Act, the Comptroller General submitted a Report to the House Committee on Post Office and Civil Service that again described the use of sampling in the 1970 Census and the improved coverage that resulted. *1976 GAO Report* at 21-22. This was the same Congressional Committee that reported on H.R. 11337, the 1976 amendments to the Census Act. See H.R. Rep. No. 94-944 (1976), reprinted in 1976 U.S.C.C.A.N. 5463. Thus, at the time of the 1976 amendments to the Census Act, Congress was fully aware that, notwithstanding the prohibition in 13 U.S.C. § 195 before it was amended, the Bureau of the Census had used sampling to supplement and improve the 1970 census population count. The legislative history reveals no congressional complaints about that practice.

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individuals that were missed in the initial field activities and add them to the census counts. In some of the most important of these projects, sampling was used and, as a result, only estimates of missed persons and housing units could be added to the counts.

Bureau of the Census, *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 1; see also *id.* at 11-16 (describing each program in detail).

The Census Bureau reported that these programs using sampling not only improved overall coverage but also "tended to increase the coverage completeness for those areas and population subgroups for which census coverage had been poorest in the past. Thus, while these procedures did not completely overcome the coverage problems, they tended to decrease the *differentials* in coverage completeness among areas and among population subgroups." *Id.* at 2 (emphasis in original).

If Congress found this use of statistical sampling to improve the population count unacceptable, surely it would have said so. Instead, in the 1976 amendments to the Census Act, Congress added language to section 141(a) explicitly authorizing the Secretary of Commerce to use sampling procedures as part of the decennial census and placing no restrictions on the Secretary's discretion to use those procedures:

The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys.

13 U.S.C. § 141(a).<sup>10</sup>

At the same time, Congress amended section 195. Where before, in areas other than apportionment the Secretary was authorized to use sampling "where he deems it appropriate," Act of Aug. 28, 1957, sec. 14, § 195, the new language *required* the Secretary to use sampling if "feasible" in areas other than apportionment. 13 U.S.C. § 195. That change was accomplished by the change from "may where he deems it appropriate" to "shall, if he considers it feasible" in section 195. Thus the two sections are easily harmonized. The Secretary *may* use sampling for all purposes. The Secretary *must* use sampling at any time that it is "feasible" except in cases of apportionment,

<sup>10</sup> This amendment to section 141(a) meets any possible need for a statement by Congress authorizing the use of sampling. Cf. Mem. Opn., Juris. App. 49a-50a; *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989).

where he or she is neither required to nor prohibited from using sampling.

If, as plaintiff contends, the addition of section 141(a) was not intended to give the Secretary broad authority to use sampling, including its use in apportionment, of what use was it? The amendment to section 195 already not only authorized, but required the Secretary to use sampling where feasible in cases not involving apportionment. As a practical matter that affirmative requirement encompassed the universe of non-apportionment sampling for the Secretary, because one must assume that in fact the Secretary would not exercise his discretion to use sampling at any time if it were not feasible. If section 141(a) does not give the Secretary authority to use sampling for apportionment, it is of no effect and is mere surplusage.<sup>11</sup>

<sup>11</sup> The canons of statutory construction counsel against construing a statute in a manner that renders some of its provisions surplusage. *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (court must construe statute to give effect, if possible, to every provision). The canons of statutory construction also counsel against absurd results. See *Burns v. United States*, 501 U.S. 129, 137 (1991); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring). An interpretation of section 195 that mandates sampling whenever feasible while absolutely forbidding it in the apportionment count would constitute a mandatory two census requirement, one census for apportionment purposes and one for all other purposes. Although two census counts might also be the result of allowing the Secretary not to use sampling for apportionment even when feasible, that result would only obtain if the Secretary, in weighing all of the factors,



Why, however, would Congress give the Secretary more discretion in the sensitive area of apportionment, while requiring sampling in all other cases, where feasible? The answer, it would seem, is that because of the high importance and constitutional significance of apportionment, Congress felt that it was not sufficient that sampling be feasible. Clearly, feasibility of sampling was a necessary condition to its use in apportionment, but not a sufficient condition. In addition to feasibility, the Secretary had to determine that it was indeed sufficiently reliable and indeed sufficiently well accepted to permit its use in apportionment. Congress obviously thought highly of sampling; it permitted it across the board and it mandated it in all cases other than apportionment. But it left to the Secretary the final decision whether or not to use it. In 1990, the Secretary decided not to. For 2000, the Secretary believes that the level of confidence in sampling is now sufficiently high that it can and should be used for apportionment as well.

**B. The Department's Assertion of Its Discretion to Determine Whether to Use Sampling is Not New to This Litigation**

The Department's assertion of its discretion over whether to use sampling to count population in the decennial census has spanned multiple administrations and both major political parties. *Census 2000 Report*, Joint App. 45. The Department has long conducted itself in a

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decided that the reliability was not high enough to justify the use of sampling for apportionment.

manner that assumes discretion over the use of sampling for apportionment purposes, based on the particular needs of the census and the statistical reliability of sampling technology available. See *Census 2000 Report*, Joint App. 81-82 (describing uses of statistical sampling and imputations since the 1940s to count people who could not be individually located).

As early as the 1970s, the Census Bureau was exploring statistical sampling techniques to address the census undercount. 1976 *GAO Report* at 21-22. And, "[t]hrough the mid-1980's, the Bureau conducted a series of field tests and statistical studies designed to measure the utility of the PES [a statistical sampling technique] as a tool for adjusting the census." *Wisconsin*, 517 U.S. at 10.<sup>12</sup> Thus, contrary to the suggestion by plaintiff and in the opinion below, this litigation does not represent a recent reversal by the Department on the issue of its discretion to use sampling. Rather, for well over a decade the Department has operated on the premise that the Census Act permits statistical sampling for apportionment purposes.<sup>13</sup>

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<sup>12</sup> In the district court proceedings challenging the 1990 census methods the Department entered into a stipulation that left open the possibility of using statistical sampling to correct the 1990 census undercount. See *City of New York v. Dept. of Commerce*, 739 F. Supp. at 764. It was only after studying the circumstances of the census, including the specific statistical methods available and their effect on the census, that the Secretary of Commerce decided not to undertake statistical correction. See 1991 Commerce Decision, 56 Fed. Reg. 33582.

<sup>13</sup> In support of its position, the Department has relied on judicial decisions since the 1980s expressly ruling that the use of statistical sampling is permitted by the Census Act (see footnote

It is true that in justifying the refusal to correct the 1980 census undercount by use of statistical sampling, the Department asserted in litigation, and defended that position in the public record, that the Census Act imposed such a bar.<sup>14</sup> See, e.g., *Carey v. Klutznick*, 508 F. Supp. at 415; 1980 Commerce Decision, 45 Fed. Reg. 69366, 69372 (1980). However, very soon thereafter, as planning for the 1990 census began, the Department reconsidered that position. See *Wisconsin*, 517 U.S. at 10. Although the Secretary of Commerce ultimately vetoed the Census Bureau's preliminary decision to use sampling in the 1990 census, the Secretary stated that "the Bureau would continue its research into the possibility of statistical adjustment of future censuses, . . . ." *Wisconsin*, 517 U.S. at 12; see also 1991 Commerce Decision, 56 Fed. Reg.

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4), as well as formal and informal opinions from the Department of Justice issued over the course of two decades to the same effect. See *Census 2000 Report*, Joint App. 133-38.

<sup>14</sup> That this was a litigation stance is apparent from the statement of Vincent Barabba, Director of the Census Bureau, in his 1980 congressional testimony on Problems with the 1980 Census Count: "We are in the midst of a lawsuit at this point. I have been instructed on advice of counsel not to get into too many details on the discussion of the apportionment and the adjustment relative to it." *Problems with the 1980 Census Count: Joint Hearing Before the Commerce, Consumer, and Monetary Affairs Subcommittee of the Committee on Government Operations and the Census and Population Subcommittee of the Committee on Post Office and Civil Service*, 96th Congress, vol. 23 at 173 (1980).

The fact that this prior agency interpretation was developed in a litigation context gives it less weight and makes it all the more appropriate for the Department to alter its position. See *Smiley v. Citibank*, 517 U.S. at 741; *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988).

at 33584. More important, the Secretary did not assert any statutory prohibition to justify the refusal to use statistical sampling in 1990. Such an interpretation of the Census Act was expressly disavowed in the explanation set forth in the public record.<sup>15</sup> Nor did Congress at that time make any move to suggest that the Census Act denied the Secretary discretion over this policy decision. In *Wisconsin*, the Department stated in its brief to this Court that "[w]e agree . . . that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." Brief of Federal Petitioners, *Wisconsin v. City of New York*, 1995 WL 668005, \*26 (1995). The Secretary of Commerce justified the decision not to use statistical sampling to correct the 1990 census as a reasonable exercise of agency discretion, and this Court upheld the decision on that ground. See *Wisconsin*, 517 U.S. at 24; see also 1991 Commerce Decision, 56 Fed. Reg. 33582.

The district court's suggestion that the agency's interpretation is entitled to "less deference" because it constitutes a reversal of position and a litigation strategy (Mem. Opn., Juris. App. 46a-47a n.11) ignores both this history and this Court's previous rulings. "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue de novo and without regard to

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<sup>15</sup> See, e.g., 1991 Commerce Decision, 56 Fed. Reg. at 33605 (Secretary states that "neither the Constitution nor the relevant statutory provisions are themselves conclusive"); *id.* at 33606 (Secretary explains that "legal considerations did not provide a basis for my decision.").



the administrative understanding of the statutes." *National Labor Relations Bd. v. Iron Workers*, 434 U.S. 335, 351 (1990). The agency's position is "entitled to deference even if it represents a departure from . . . prior policy." *National Labor Relations Bd. v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990); see also *Smiley v. Citibank*, 517 U.S. at 742 ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal" to judicial deference); *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993) ("The Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation."); *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) ("This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question.") (quoting *Chevron*, 467 U.S. at 862). Significantly, in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), this Court deferred to the Census Bureau and Department of Commerce interpretation of the Census Act as permitting them to include overseas federal employees in the decennial census as residents of the "home of record" listed in personnel files, despite the fact that previous policy had excluded such individuals from the census count. 505 U.S. at 793.

As a result of the Census Act's broad grant of autonomy, the Bureau and Secretary have made significant changes to the census through the years with little outside interference. These include sampling, household forms to replace person-by-person forms, self-enumeration (mail-out/mail-back) to replace face-to-face interviews, optical scanning machines to extract data from questionnaires, "hot deck" imputation to assign values

for missing data, extra field checks to reexamine apparent vacant dwellings, and the postal vacancy check established in 1970. Choldin, *supra*, at 236-37. These changes, when instituted, had "equally weighty numerical implications" as the procedures at issue in this case. *Id.* In each instance, the changes were a result of the Bureau perceiving a problem with the accuracy of the census, developing and testing a solution, and then introducing the solution into the census. *Id.* The use of statistical sampling to correct the differential undercount was approached with the same deliberateness. It is entitled to the same deference.

### C. The Department's Interpretation of the Statute is Reasonable

As documented in the district court opinion and in the record herein, the Department of Commerce and the Census Bureau have acted carefully and deliberately in approaching the question of statistical sampling. Indeed, the Department's decision to expand the use of statistical sampling for the 2000 census is based on a much broader consensus among experts, policymakers and politicians than was the case for the Secretary's 1990 decision not to rely on sampling. The Secretary's decision statistically to adjust the initial count in the 2000 census comes after years of study and is anchored in the work and recommendations of the National Academy of Sciences, Census Bureau experts and several advisory committees as well as input from public meetings and members of Congress. *Census 2000 Report*, Joint App. 56-58.

The Secretary's decision not to use statistical sampling to correct the undercount in 1990 was based on his belief that although a statistical adjustment would improve the accuracy of the overall count, it would not improve the accuracy of the distributive count, which was more important for apportionment purposes, and might even "mak[e] the shares less accurate." 1991 Commerce Decision, 56 Fed. Reg. at 33583. See also *Wisconsin*, 517 U.S. at 11, 20-21. This concern has now been resolved by changes in the statistical sampling procedures planned for the 2000 census. See *Census 2000 Report*, Joint App. 87-98. Unlike what was proposed for 1990, in the 2000 census a sample from one state will not be used to count population in another state. *Id.*, Joint App. 94. Thus, not just at the national level but also "[a]t all geographic levels important to political representation and funds allocation, Census 2000 will provide more accurate results than physical enumeration alone." *Census 2000 Report*, Joint App. 44.

The policy considerations surrounding the census undercount reinforce the wisdom of allowing the Department of Commerce discretion in the use of statistical sampling. The social, economic and political problems that result from a persistent and uncorrected undercount are enormous. When that undercount can be corrected, but is not, the integrity and democratic character of our system of representation are, understandably, called into question. That minority groups dramatically and disproportionately bear the burden of the undercount further aggravates the social, political and economic disjuncture.

"The power of an administrative agency to administer a congressionally created . . . program necessarily

requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); see also *Auer v. Robbins*, \_\_\_ U.S. at \_\_\_, 117 S. Ct. at 910; *Department of the Treasury v. Federal Labor Relations Authority*, 494 U.S. 922, 933 (1990). "An initial agency interpretation is not instantly carved in stone" and it is entirely appropriate for the agency to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64.

Finally, Department of Commerce discretion is consistent with, and indeed necessary for, achievement of the fundamental goal of the census: to provide the basis for equal apportionment. There is no question in this case that the goal of the Commerce Department is to use statistical sampling to increase accuracy and that the Secretary of Commerce has reasonably determined that statistical sampling will, in fact, increase accuracy.

It is now apparent that the obstacles are such that no matter how much money and effort are put into traditional counting methods, those methods, standing alone, cannot hope to address the undercount problem.<sup>16</sup> The

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<sup>16</sup> *Census 2000 Report*, Joint App. 42, 49-52, 99, 106-07; *Modernizing the U.S. Census* at 3. In the 1990 census, the Census Bureau expanded and improved all the traditional methods and spent more money than ever before. Notwithstanding these extraordinary efforts, the traditional counting methods resulted in census figures that were less accurate than the 1980 census, a census that failed to count 4.7 million people, and a differential undercount that denied California a seat in the House of Representatives and hundreds of millions of dollars in federal funds to which it otherwise would have been entitled.



refinement of the mathematical tools together with the overriding need to address the disparate undercount makes the Department's decision to use statistical sampling in the 2000 Census not only reasonable, but compelling.

This Court's conclusion in *Good Samaritan Hospital* speaks directly to this case:

In the circumstances of this case, where the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction. We should be especially reluctant to reject the agency's current view which, as we see it, so closely fits "the design of the statute as a whole and . . . its object and policy."

*Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417-18 (1993) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)).

## II. THE CONSTITUTION DOES NOT PROHIBIT THE USE OF STATISTICAL SAMPLING

In *Wisconsin v. City of New York*, this Court stated the Constitutional standard that governs this case:

[S]o long as the Secretary's conduct of the census is "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 505 U.S. at 804, it is within the limits of the Constitution. In light of the Constitution's broad grant of authority to Congress, the Secretary's decision not to adjust need bear only a reasonable relationship to the accomplishment of an actual enumeration of the

population, keeping in mind the constitutional purpose of the census.

517 U.S. at 19-20.

The use of statistical sampling planned by the Secretary of Commerce for the 2000 census is consistent with the language of the Constitution and is demanded by the constitutional goal of equal representation.

The critical constitutional provision is Article I, Section 2, Clause 3, which provides:

Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; . . .

U.S. Const. art. I, § 2, cl. 3.<sup>17</sup>

<sup>17</sup> The three-fifths rule was later superseded by Section 2 of the Fourteenth Amendment. In the proceedings below, plaintiffs argued that the Fourteenth Amendment language that representatives shall be apportioned "counting the whole number of persons in each state, . . ." forbids statistical adjustment of the census. U.S. Const. amend. XIV, § 2. It is

The disputed language is the phrase "actual enumeration." To determine the meaning of that phrase, it is appropriate to look to three sources: the language itself, the historical context in which it was adopted, and the purpose of the provision. Each source supports a construction that allows for the statistical sampling at issue here.

The word "enumeration" is defined in Samuel Johnson's 1773 dictionary as "[t]he act of numbering or counting over; number told out." 1 Samuel Johnson, *A Dictionary of the English Language* (1773). Webster's 1806 dictionary states that "enumeration" means "a numbering or counting over."<sup>18</sup> Noah Webster, *A Compendious Dictionary of the English Language: A Facsimile of the First (1806) Edition* (Crown Publishers 1970). Use of the term "enumeration" elsewhere in the Constitution suggests that it is synonymous with "census." See U.S. Const.

obvious, however, that "whole number of persons" in the Fourteenth Amendment was intended to repeal and replace the three-fifths rule of Article I, Section 2, Clause 3. In this respect, the Fourteenth Amendment, if anything, would demand that the census be corrected, because the differential undercount that results from a traditional census means, as a practical matter, that members of groups protected by the Fourteenth Amendment are counted as less than a whole person.

<sup>18</sup> Both Webster's and Johnson's definition of the term "enumerate" would likewise support an interpretation that allows for the use of statistical sampling. Johnson provides three definitions for the word "enumerate": "To reckon up singly; to count over distinctly; to number." Johnson, *supra*. Webster defines "enumerate" as "to number up, count over, recite." Webster, *supra*. Each dictionary, then, includes the general notion of counting, and the statistical technique at issue here is just that, a form of counting.

art. I, § 9, cl. 4 ("No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."). These formal definitions and usage comport with common sense: to enumerate or conduct an enumeration means to count or ascertain the number. That was still the definition of "enumeration" in 1933, and it is still the definition today.<sup>19</sup>

Similarly, the word "actual" supports an interpretation of the constitution that permits the statistical sampling contemplated here. See Johnson, *supra*. ("Really in act; not merely potential");<sup>20</sup> Webster (1806), *supra* ("really in act, real, certain, positive"). There is no doubt that the Census Bureau's use of statistical sampling to supplement traditional counting methods will be a real ascertainment of population; indeed, all evidence is that it will be a much more accurate count than one based exclusively on traditional methods.

There are various ways to conduct an actual count. One may count singly, in groups, by multiplying, and by the use of statistical techniques such as those at issue here. One may count by personal observation, through hearsay information, and through imputation. For many

<sup>19</sup> See, e.g., 3 *The Oxford English Dictionary* 227 (1933); Webster's *New World Dictionary of American English* (Victoria Neufeldt & David Guralnik eds., 3d ed. 1988).

<sup>20</sup> This is Johnson's second definition. The first, which does not pertain here, is "[t]hat which comprises action." *Id.* The third definition offered is "[i]n act; not purely in speculation." *Id.* Neither of these two alternative definitions is inconsistent with the Department's use of statistical sampling.



years, the decennial count of the population was done by personal observation, with U.S. Marshals or Census Bureau enumerators ascertaining numbers in household groups and in categories by gender and status within the household. Hearsay, however, was used when personal observation was not possible. In the twentieth century, counting by personal observation was replaced by a mail procedure, because the Census Bureau and the Department of Commerce found that mail responses allowed a more accurate count. Now, the Department wishes to use statistical sampling to supplement the traditional procedures and correct for errors that the traditional procedures are known to produce. Each step in this evolution is consistent with the words of the Constitution calling for an "actual enumeration" and with the words of the Constitution expressly stating that the count shall be "in such manner as they [Congress] shall by law direct."<sup>21</sup> U.S. Const., art. I, § 2, cl. 3.

This conclusion is further reinforced when one looks to the history of Article I, Section 2. It is useful to remember that just as a census by U.S. mail was not within anyone's contemplation in the 18th century, neither was statistical sampling. Indeed, nothing at all comparable to statistical sampling existed at that time. Nor were such issues the focus of any of the debates surrounding Article I, Section 2.

<sup>21</sup> That Congress' discretion in this regard is "virtually unlimited" and has been delegated to the Secretary of Commerce was unanimously resolved by this Court in *Wisconsin v. City of New York*, 517 U.S. at 19.

The census requirement was a byproduct of the Great Compromise, which established a bicameral Legislature with equal representation of each state in the Senate and proportional representation in the House of Representatives. It was within the context of this overarching debate that the census requirement was adopted in order to provide a basis for proportional apportionment of representatives among the states.

There was very little direct discussion of the census during the Federal Convention of 1787; rather, to the extent the census was addressed, it was in connection with the rule of representation for the House of Representatives. The discussions occurred at three points: June 11, July 5-13, and August 8, 1787. The debates surrounding this issue are reported in *The Records of the Federal Convention of 1787* ("Records of the Federal Convention"), *supra*. See 1 *Records of the Federal Convention* at 196-208, 524-606; 2 *Records of the Federal Convention* at 221-23. Resolutions and proposals regarding language are also reported in 1 *Records of the Federal Convention* at 193, 227-29 and 2 *Records of the Federal Convention* at 130-31, 178, 182-83, 219, 571, 590-91 and 607-08.<sup>22</sup> The census was also addressed by James Madison in *The Federalist Papers*. *The Federalist* Nos. 54, 58 (James Madison). The history of the Constitution reveals that there were two issues in dispute and that they were resolved as follows.

<sup>22</sup> For a summary of the Convention proceedings relating to the census, see Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 70-74 (1996); see also Declaration of Jack N. Rakove, Joint App. 381-99.

The first issue was whether the rule of representation, and hence the census, was to be based on population or on wealth. See 1 *Records of the Federal Convention* at 205-08, 533-34, 536-37, 540-42, 559-62, 567, 582-88, 591-97. Part of this issue was controversy over whether and how to include the slave population. *Id.* at 205-06, 561, 580-82, 586-88, 592-97, 603-04; see also 2 *Records of the Federal Convention* at 220-23. Ultimately, representation based on population was written into the Constitution. The only compromise in this respect was that slaves, who in other aspects of the law were treated as property, would be treated as people, provided, however, that an individual bound in slavery would be counted as only three-fifths of a person. U.S. Const., art. I, § 2, cl. 3.

The second issue was whether the relative legislative power of the states established by the initial apportionment should or would be locked in. 1 *Records of the Federal Convention* at 534, 558-61, 567, 578-80, 583-86, 599. The backdrop for this debate was the power struggle between large and small states, between northern and southern states and between the Atlantic states and the anticipated new states in the West. See *id.* at 533-34, 536-37, 540-41, 560, 562, 567, 571, 578-79, 583, 601-02, 604-05. The question was should the national Legislature<sup>23</sup> be at liberty regarding whether, how often and on what basis to reapportion, or should periodic reapportionment be required

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<sup>23</sup> Apportionment under the direction of the General Legislature was seen as desirable because the states would not be impartial. 1 *Records of the Federal Convention* at 580.

by the Constitution. *Id.* at 571, 578-79, 581-86.<sup>24</sup> An adjunct of this issue was the question of whether the number of representatives in the first house of the legislature should grow or change. *Id.* at 533-34, 560; see also *The Federalist* Nos. 54, 58 (James Madison). Ultimately, the Constitution fixed a requirement of periodic apportionment to occur every ten years and to be based upon a population formula which counted "the whole number of free persons," excluded "Indians not taxed," and counted slaves as "three-fifths of all other persons." U.S. Const., art. I, § 2, cl. 3. And, the national Legislature was left at liberty to determine the manner in which the census would be conducted. *Id.*

Notably absent from the debates is any discussion whatever regarding how population data was to be collected. Instead, the call for a census stands in juxtaposition to the entirely conjectural numbers that were used for the first apportionment. See 1 *Records of the Federal Convention* at 578 (contrasting "the conjectural ratio which was to prevail in the outset" with "a Revision from time to time according to some permanent & precise standard . . ."); *id.* at 602 (Mr. Elsworth contrasts an "actual census" with the initial apportionment; Mr. Mason "doubted much whether the conjectural rule which was to precede the census, would be as just, as it would be rendered by an actual census."); *id.* at 559 (initial apportionment "did not appear to correspond

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<sup>24</sup> The concern that leaving whether and on what basis to reapportion to the Legislature would work against the interests of the Southern states was also expressed in connection with how slaves would be treated in the calculation. *Id.* at 592-96.



with any rule of numbers, or of any requisition hitherto adopted by Congs."); *id.* at 560 (initial apportionment "little more than a guess."); *id.* at 579 (initial apportionment "a mere conjecture"); *id.* at 586 ("the (temporary) allotment" at the outset gave the Southern states more than the formula for counting free and enslaved persons would have); *see also* *The Federalist* No. 36, at 172 (Alexander Hamilton) (Bantam Classic ed. 1982) (state's share of taxes based on census rather than discretion of the Legislature).<sup>25</sup>

The term "actual enumeration" was introduced by the Committee of Style only in the final week of the Convention and was never discussed. 2 *Records of the Federal Convention* at 590.<sup>26</sup> Throughout the debates, the delegates used the word "census," not the word "enumeration" to describe what they wanted. Census was the term used in motions and votes on motions, 1 *Records of the Federal Convention* at 564, 575, 586, 589, 590, 591, 596, 598, and in the statements of the delegates. *Id.* at 567 (Randolph), 570 (Randolph), 571 (Morris), 579 (Williamson), 580 (Randolph), 583 (Morris), 592 (Pinkney),

<sup>25</sup> Unlike an apportionment based on an actual census, the initial apportionment gave states credit for anticipated future growth in setting their number of representatives. *See, e.g.,* 1 *Records of the Federal Convention* at 561, 568 (Georgia); *id.* at 566, 601 (New Hampshire).

<sup>26</sup> The records of the convention on Article I, Section 9, where the term "enumeration" also appears state that this term is "explanatory" of "census." *See* 2 *Records of the Federal Convention* at 618; *see also* *The Federalist* No. 36, at 172 (Alexander Hamilton) (Bantam Classic ed. 1982) (regarding state's proportional share of taxes, "[a]n actual census or enumeration of the people must furnish the rule; . . .").

594 (Randolph), 595 (Wilson), 600 (Gerry), 602 (Elseworth, Wilson, Mason), 603 (Gerry); *see also* 2 *Records of the Federal Convention* at 131 (resolution of Committee on Detail). This sequence of events and use of language, supports the conclusion that the "actual enumeration" required by Article I, Section 2 simply means an actual census.

Finally, the statistical correction contemplated by the Department of Commerce is not only consistent with but is demanded by the fundamental purpose of Article I, Section 2: subject only to the provision that each state shall have one representative, this constitutional provision calls for apportionment and subsequent redistricting on the basis of one-person-one-vote. *See Karcher v. Daggett*, 462 U.S. 725 (1983); *Wesberry*, 376 U.S. 1. The decision in *Wisconsin* does not vitiate that constitutional command, it merely tempers it with deference to the discretion of the Secretary of Commerce, under the broad delegation of authority from Congress, to decide what will, in fact, enhance census accuracy and hence advance the underlying goal of equal apportionment. 517 U.S. 1.

Here, as in *Wisconsin*, "the Secretary of Commerce, to whom Congress has delegated its constitutional authority over the census," has exercised that authority "in light of the constitutional purpose of the census . . ." 517 U.S. at 24. The only difference is that in *Wisconsin*, the Secretary determined that an "actual enumeration" would best be achieved without the use of the statistical sampling techniques then available, whereas here the Secretary has determined that an "actual enumeration" will best be

achieved by using the much more refined techniques that are now available.

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### CONCLUSION

The judgment below should be reversed.

The Secretary of Commerce should be allowed to provide the several States with the most accurate enumeration that is within his power to achieve.

Dated: October 5, 1998.

Respectfully submitted,

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### APPENDIX

#### Constitutional Provisions and Statutes Involved

U.S. Constitution, art. I, § 2, cl. 3 provides:

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

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U.S. Constitution, art. I, § 9, cl. 4 provides:

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

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U.S. Constitution, Am. XIV, § 2, first sentence provides:

SECTION 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.

U.S. Code, Title 13, § 141 provides:

§ 141. Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan

identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of

#### App. 4

population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1) If -

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census -

#### App. 5

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.

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U.S. Code, Title 13, § 195 provides:

§ 195. Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Pub. L. No. 105-119, 111 Stat. 2440, 2482 (1997), Section 209(e)(1) provides:

(e)(1) Any action brought under this section shall be heard and determined by a district court of three judges in accordance with section 2284 of title 28, United States Code. The chief judge of the United States court of appeals for each circuit shall, to the extent practicable and consistent with the avoidance of unnecessary delay, consolidate, for all purposes, in one district court within that circuit, all actions pending in that circuit under this section. Any party to an action under this section shall be precluded from seeking any consolidation of that action other than is provided in this paragraph. In selecting the district court in which to consolidate such actions, the chief judge shall consider the convenience of the parties and witnesses and efficient conduct of such actions. Any final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the

United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under this section may be issued by a single Justice of the Supreme Court.

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No. 98-404

Supreme Court, U. S.

FILED

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IN THE  
**Supreme Court of the United States**  
October Term, 1998

**UNITED STATES DEPARTMENT  
OF COMMERCE, ET AL.,**

*Appellants,*

v.

**UNITED STATES HOUSE OF  
REPRESENTATIVES, ET AL.,**

*Appellees.*

On Appeal From The United States District Court  
For The District Of Columbia

**BRIEF FOR APPELLEES RICHARD A. GEPHARDT,  
DANNY K. DAVIS, JUANITA MILLENDER-  
McDONALD, LUCILLE ROYBAL-ALLARD, LOUISE  
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**IN THE  
Supreme Court of the United States  
October Term, 1998**

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**No. 98-404**

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**UNITED STATES DEPARTMENT  
OF COMMERCE, ET AL.,  
Appellants,**

**v.**

**UNITED STATES HOUSE OF  
REPRESENTATIVES, ET AL.,  
Appellees.**

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**On Appeal From The United States District Court For The  
District Of Columbia**

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**BRIEF FOR APPELLEES RICHARD A. GEPHARDT,  
DANNY K. DAVIS, JUANITA MILLENDER-  
McDONALD, LUCILLE ROYBAL-ALLARD, LOUISE  
M. SLAUGHTER, and BENNIE G. THOMPSON  
SUPPORTING APPELLANTS**

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**STATEMENT**

The issue in this case is whether the Census Act or the Constitution will be interpreted as requiring the Census Bureau to continue to use a methodology that will predictably fail to count a substantial percentage of the population -- most of whom will be members of minority groups with relatively low incomes. The House of Representatives has not contested the proposition that, absent use of statistical adjustment techniques, this differential "undercount" will occur in the 2000 Census, as it has in every census in recent memory. Nor has it denied, for

purposes of this litigation, that the proposed adjustment techniques will substantially improve the accuracy of the census. The House leadership's opposition to scientific "sampling" is instead based on the fact that it would prefer to retain a system that counts only a non-representative "sample" from which the poor and minorities are disparately excluded. As we show, however, Congress has never mandated retention of that system, and there is no reason to read the Constitution as barring methodologies that will produce a more accurate count of the entire population.

**A. The Traditional Approach to Enumerating the Population, the "Undercount," and Previous Forms of Statistical Adjustment Designed to Improve the Accuracy of the Decennial Census**

The decennial census, although sometimes denominated a "headcount," has never been a simple process of counting heads. In the very first census, in 1790, census officials relied on one member of each household to report the number of individuals in that household, rather than counting each individual themselves. *See infra*, p. 47. Since that time, census officials have adopted a variety of innovative techniques in an effort to compile accurate reports about the number of people living in each of the nation's households. Just one example is the evolution from a survey based on home visits to use of mailed out forms followed, where necessary, by visits. *See Bureau of the Census, U.S. Dep't of Commerce, Report to Congress - The Plan for Census 2000*, JA 34, 46-47 (rev. Aug. 1997) ("Report to Congress"). Despite this tradition of innovation, however, in every decade, the Census Bureau has faced enormous problems in its efforts to locate all of the population and obtain accurate information about it.

First, the census must find out where people live, a process that inevitably leaves out millions who live in unknown dwellings, homes thought to be empty, or no home at all. *See*

*id.* at JA 73-74, 87, 104; *National Law Ctr. on Homelessness & Poverty v. Brown*, Civ. A. No. 92-2257-LFO, 1994 WL 521334 (D.D.C. Sept. 15, 1994). Once the census locates a dwelling, it must find out how many people live there. But the Census Bureau does not physically count individuals. Rather, it relies on a person to report (either in person or by mail) how many individuals live in a household. Even when that person is a member of the household, incorrect answers are frequent, in part because the census must determine each individual's "usual residence" on April 1 of a census year, which often does not correspond to the place where an individual actually is on that day. *See Franklin v. Massachusetts*, 505 U.S. 788, 804-06 (1992); *Borough of Bethel Park v. Stans*, 449 F.2d 575, 579-81 (3d Cir. 1971); *Report to Congress*, JA 106. The probability of error increases dramatically when the census is unable to contact anyone in a given dwelling and must seek information from a neighbor, building manager, or other "reliable" source. *See City of New York v. United States Dep't of Commerce*, 34 F.3d 1114, 1121 (2d Cir. 1994), *rev'd on other grounds, sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996).<sup>1/</sup>

The result of these and other problems is the persistent "undercount." In the 1990 census, 15 million people were not

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<sup>1/</sup> In some instances, the Census Bureau simply stops trying to gather information about a household. In 1990, for example, when the Bureau had obtained data from about 95% of the occupied households in a given district, it made only one more attempt to contact the nonresponding households in that district. *City of New York*, 34 F.3d at 1121. That same year, the Bureau created a list of shelters and other sites frequented by homeless persons by mailing a letter to 39,000 local governments requesting the names of such sites. Although 14,200 local jurisdictions responded, the Bureau conducted an operation to count the homeless in only 5,050 of them, or roughly one-eighth of all localities contacted. *National Law Center on Homelessness*, 1994 WL 521334, at \*1-\*2. *See also Franklin*, 505 U.S. at 794 (discussing Census Bureau's limited attempt to include overseas federal employees in the census).



counted at all or were omitted from the data for the block where they resided (the gross undercount). Another 11 million people were counted but should not have been, or were counted more than once, or were otherwise included in a block where they did not reside (the gross overcount). *Report to Congress*, JA 120. Thus, while the net undercount in 1990 was "only" 4 million people (15 million undercounts minus 11 million overcounts), the overall level of error was much larger.

The census is much more likely to miss some segments of the populace than others, and thus to overestimate the populations of some geographical areas while underestimating the populations of others. JS App. 3a-4a & n.2; *Wisconsin v. City of New York*, 517 U.S.1, 7 (1996). In 1990, for example, renters were missed far more frequently than homeowners. See *Report to Congress*, JA 49. Racial and ethnic minorities are also disproportionately undercounted. Compared to non-Hispanic whites, the undercount rate in 1990 was six times greater for African-Americans and seven times greater for Hispanic persons. *Id.* at JA 49. The error rate increased between 1980 and 1990, *id.* at JA 47-48; JS App. 3a, and the Census Bureau predicts that, unless it changes its methodology, the rate will increase even further in 2000, *Report to Congress*, JA 47-48, 51-52.<sup>2/</sup>

Using such flawed data to apportion representatives amounts to pretending that one non-representative sample of the population -- people who are counted by the census one or more times -- reflects the distribution of the whole population. *Id.*

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<sup>2/</sup> The root of the problem appears to be several large social trends, such as growth in mobility, in the number dual-worker families, and in alienation from society generally and government in particular. *Id.* at JA 51-52.

at JA 81.<sup>3/</sup> Thus, as the Census Bureau explained, "[T]he issue is not whether to 'sample' but whether to sample scientifically. . . . [I]nformation on less than the whole population has always been used to characterize the whole population." *Id.*

The Census Bureau has for years used statistical techniques in partial efforts to *reduce* the undercount. Since 1940, in cases where a residence is believed to be occupied but no information about its residents is obtainable, the Bureau has "imputed" that information based on the demographics of nearby households. *Report to Congress*, JA 81-82; Congressional Research Service, *The Decennial Census: an Analysis and Review, Report to the Subcomm. on Energy, Nuclear Proliferation and Federal Services*, 94th Cong., at 12-13 (Nov. 1980) ("*Decennial Census: an Analysis*"). In 1970, the Bureau went further, using sampling techniques to ascertain the number of people living in dwellings it had initially identified as vacant. Based on a sample survey, it adjusted the final census data by deeming 11.4% of all "vacant" units occupied, thereby adding more than one million people to the census. See *Report to Congress*, JA 82;

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<sup>3/</sup> This, in turn, can mean that some states are unfairly over- and under-represented in Congress. In addition, although not required to do so under any theory, the Census Bureau has in the past used the same unadjusted figures in fulfilling its obligation to provide data to the states so they may draw legislative districts. Using such data to draw congressional districts can produce districts within a single state that vary in size by as much as 8 percent. See John Mercurio, *Study: Minority Districts Undercounted*, Roll Call, Sept. 28, 1998.

Comptroller General, *Report to the House Committee on Post Office and Civil Service: Programs to Reduce the Decennial Census Undercount* 12 (May 5, 1976) ("Decennial Census").<sup>4/</sup>

#### B. Plans for the 2000 Census

For the 2000 Census, the Census Bureau plans to use more extensive statistical methods, based in part on the recommendations of three panels of the National Academy of Sciences. JS App. 5a; *Report to Congress*, JA 41-43, 53-55, 129-32. It will begin by attempting to collect census data through direct contact with every known household in the nation -- just as it has in the past. Nonetheless, despite several innovations designed to increase the response rate and accuracy of the mailed out census forms, see *Report to Congress*, JA 73-79, it is likely that 34 million households still will not respond, *id.* at JA 88.

As a result, following up with those who do not respond will be an enormous undertaking. To manage it, the Bureau intends to rely in part on sampling. It will personally contact sufficient households (randomly selected) to ensure that it has obtained responses from at least 90% of the households in each census tract. *Id.* at JA 88; JS App. 6a-7a. The characteristics of the households personally contacted will then be used to impute characteristics to the remaining households. *Report to Congress*, JA 92. This use of sampling, which is little different

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<sup>4/</sup> Also in 1970, an additional 484,000 people were included in the census results based on a statistical survey of rural Southern areas where numerous addresses had been omitted from the Bureau's lists. *Decennial Census* at 12; Brief for Respondents, 1995 WL 731717, at \*5, *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (Nos. 94-1614 et al.) ("Brief for Respondents") (summarizing trial record relating to census methods). The Census Bureau plans to repeat the Postal Vacancy Check in 2000, but for unexplained reasons, the "Postal Vacancy Check sampling plan is not at issue in this litigation." JS App. 6a.

in basic concept from the "imputation" used since 1940, not only will save substantial amounts of money but, by shortening the time required for the initial count, will improve the effectiveness of the next phase of the process -- the Integrated Coverage Measurement or "ICM" survey. *Id.* at JA 89-90.

In that phase, the Census Bureau will make an exhaustive effort to interview the 750,000 housing units located in a scientifically selected sample of 25,000 blocks. *Id.* at JA 93-94; J.S. App. 8a. The blocks will be selected to represent different demographic strata in each state. If there is a discrepancy between the data collected for a household during the original "headcount" and the ICM interview, a follow-up ICM interviewer will revisit the address to verify the true situation. These steps, resulting in very accurate data for the scientifically selected ICM sample, would be impossible to implement for every block in the nation. *Report to Congress*, JA 98.

Using the statistical methodology of Dual System Estimation (DSE), the Census Bureau will then compare the results of the ICM for the selected sample blocks with the results of the original "headcount" for those same blocks. See *Wisconsin*, 517 U.S. at 8-9 (briefly describing one version of the DSE process).<sup>5/</sup> By comparing these data, DSE can provide even more accurate results for these blocks than those provided by either of the prior counts. *Report to Congress*, JA 97.

Using the DSE results for the ICM sample blocks, the Census Bureau will then determine the error rate (or "estimation factor") in the initial "headcount" for individuals belonging to various demographic groups (called "poststrata"). *Id.* at JA 97.

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<sup>5/</sup> The Census Bureau has refined its scientific sampling methods since 1990 to increase their accuracy. *Report to Congress*, JA 94-96; Stephen Fienberg Decl. at ¶¶ 22, 33, 35 (filed May 4, 1998), JA 367, 371-73. For example, the strata in the 2000 census will not cross state lines. *Report to Congress*, JA 94, 96.



The estimation factors will then be applied to adjust the original population counts for each poststratum; these totals will be summed to obtain the total population of the state; and the state totals will be summed to arrive at the population of the nation. *Id.* at JA 97-98.

These scientific sampling procedures will result in population data much more accurate than that produced by the traditional census methods. *Id.* at JA 54-55, 120-23. Moreover, the census would cost \$675 to \$800 million more without sampling, despite its dramatically lower accuracy compared to the Bureau's planned approach. *Id.* at JA 107-12, 120-21.

The Bureau's scientific sampling methods are also more difficult to manipulate for political purposes than less scientific approaches. With any sample, whether obtained through an intrinsically biased "headcount" or by a scientific selection of a representative sample, some differences will exist between the characteristics of the sampled population and the larger group from which the sample was chosen. In a scientific sample, however, sampling error is readily measured based on the mathematics of probability. *Id.* at JA 117. In contrast, errors attributable to data collection for a non-scientific sample produce biases in the results that cannot be readily measured or mathematically controlled. *Id.* at JA 116-17. Because scientific sampling has known, objective properties, "experts agree that the use of sampling in Census 2000 should minimize the opportunity for political manipulation, not increase it." *Id.* at JA 129.

### C. Congress and Legislation Concerning "Sampling"

Congress first addressed the issue of "sampling" in the census in 1957, in the original version of 13 U.S.C. § 195. That provision authorized the Census Bureau to use "the statistical method known as 'sampling'" for all purposes "[e]xcept for the determination of population for purposes of apportionment of

Representatives in Congress among the several States." 13 U.S.C. § 195. At that time, the purpose was to authorize what had come to be known as the "long form" -- a lengthy set of supplemental questions that had been posed during the 1940 and 1950 decennial censuses only to a randomly selected "sample" of the population. Responding to a request from the Census Bureau for express authorization, Congress agreed that it would be more efficient and less costly to continue using the long form. See S. Rep. No. 85-698, (1957), reprinted in 1957 U.S.C.C.A.N. 1706, 1708 ("The proper use of sampling methods can result in substantial economies in census taking."); H.R. Rep. No. 85-1043, at 7 (1957) (same).

Thus, when Congress originally exempted apportionment from its authorization of sampling, it understood sampling to refer to a method, designed to promote efficiency rather than accuracy, in which information about a whole population was derived from a small survey as a "*substitute*[ ] for a full census." See H.R. Rep. No. 85-1043, at 7 (emphasis added). That is presumably why no one subsequently saw any conflict between the original section 195 and the use, for apportionment purposes, of sampling-based techniques like imputation or the 1970 postal vacancy check, designed to enhance the accuracy of a "full census."

In 1976, Congress amended section 195 to provide that "the Secretary *shall*, if he considers it feasible" use sampling. (Emphasis added.) The "except" clause remained the same. Congress also amended 13 U.S.C. § 141(a) to provide, without qualification, that the decennial census may "includ[e] the use of sampling procedures." As we show *infra*, the best interpretation of these amended sections is that they authorized the Census Bureau to use sampling for apportionment purposes. But there is little extrinsic evidence to confirm or rebut that interpretation. We do know that key members of Congress, including key supporters of the 1976 Amendments, were

simultaneously expressing concern about the undercount and pushing the Bureau to develop statistical techniques for eliminating it, hopefully for use in the 1980 Census. *See infra* p. 32. Logic suggests that they may have recognized the potential tension between these reforms and the existing version of section 195, and set out to ameliorate the problem by clarifying that section 195 did not prohibit such accuracy-enhancing techniques. In so doing, they would have been acting consistently with a longstanding and non-controversial trend of Congress giving more and more discretion to the Census Bureau to adopt methods to increase the accuracy of the census. *See infra* note 21.

As we discuss *infra*, the district court in this case took a different view – that the absence of controversy in 1976 means that members of Congress did not understand the amendments to change the prior law concerning “sampling” and apportionment. But even assuming that was true, it does not mean those members ever had an understanding that the law barred sampling-based techniques designed to *improve* the *accuracy* of a full count. They may well have assumed that “sampling,” in 1976 as in 1957, referred only to a technique of surveying a small “sample” deemed to represent the entire population. As in 1957, there is absolutely no indication in the legislative history of the 1976 Amendments that Congress was opposed to use of statistical adjustments to improve the accuracy of a full count.

#### D. Proceedings Below

This suit was brought by the Speaker of the House of Representatives, suing in the name of the entire House pursuant to a special jurisdictional statute, section 209 of the 1998

Appropriations Act.<sup>6/</sup> The House sought to enjoin the defendant executive officials and agencies from employing statistical sampling in taking the census for the purpose of apportioning seats in the House of Representatives. It did not allege that statistical sampling will render the census less accurate as a measure of the *actual* number and distribution of people in the United States. This case thus presents a pure question of law: whether the Constitution or the Census Act forbids the use of sampling, regardless of its accuracy, for reapportionment purposes.

The district court ruled in favor of the House, relying on the Census Act without reaching the constitutional issue. It held that section 195 of the Census Act prohibits sampling, and that this section trumps the apparent authorization of sampling in section 141 of the Act. Because the district court was wrong, and because the Constitution also does not proscribe the methodology the Census Bureau intends to use in the 2000 Census, this Court should reverse.

#### SUMMARY OF ARGUMENT

1. This district court’s ruling presents a textbook example of statutory interpretation emphasizing everything but the language of the two relevant statutory provisions, 13 U.S.C. §§ 141(a) and 195. Read *together*, as this Court’s precedents require, these sections plainly authorize the Census Bureau to use sampling-based techniques in conducting all aspects of the decennial census. As the district court recognized, section 141(a) says so on its face. And section 195 does not take this authorization back. Section 195 *mandates* the use of sampling

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<sup>6/</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2482-83 (1997). Under § 209(g) of this Act, the Speaker or his designee may commence a civil action “for and on behalf of the House” to prevent the use of sampling.



by the Census Bureau if feasible, and then exempts counts used for congressional apportionment from that mandate. But an exception from a mandate does not ordinarily constitute a prohibition. Even the district court acknowledges that such a structure is ambiguous. That being so, there is no justification for reading section 195 as creating an exception to the authorization of sampling simultaneously established in section 141.

The district court based its interpretation on two principles of statutory interpretation supposedly designed to uncover and vindicate legislative intent not reflected in the plain language of the Act. But it makes no sense to erect a rebuttable presumption that a statutory amendment did not change the meaning of that very statute. Nor does it make sense to abandon the best reading of the words Congress chose to use, based on an intuition that Congress would have spoken with more clarity, or confirmed its intent in legislative history, if it had meant to make a change in the law. See, e.g., *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

Even assuming the district court was right to abandon textual analysis for inferences about what Congress must have "meant," its intuitions were based on anachronistic assessments of what would have seemed important or controversial in 1976, as well as of how the statutory change would have been understood at that time. First, there is little reason to believe that amendments authorizing sampling for apportionment would have been viewed as the partisan issue they have since become. Congress had a long history of supporting changes in the census designed to improve accuracy, including sampling-based methods — such as "imputation," and the "postal vacancy check" — that were already in use. In 1976, the same House oversight committee that reported out the 1976 Amendments held a hearing on the undercount, at which members strongly

pressed the Census Bureau to develop and implement statistical adjustment techniques. It is reasonable to infer that the 1976 Amendments were designed to eliminate any (inadvertent) prohibition on the use of such techniques that existed in the prior law. Indeed, a year later, the same House members most involved in census matters introduced a bill to require the use of statistical adjustment techniques in the 1980 census — a bill that contained no provision altering section 195, with its supposed prohibition of that practice.

Moreover, even if members of Congress did not understand in 1976 that they were changing the law with respect to "sampling" and apportionment, that does not mean that they intended to leave in place an existing ban on statistical adjustments of full counts. When, in 1957, Congress exempted apportionment from the authorization to use sampling, it did not understand "sampling" to include such adjustments; at that time, the sole issue was the extent to which the Bureau could survey the population by posing questions to a representative subset or "sample." Nothing in the 1976 legislative history indicates an intent to *expand* any existing prohibition on "sampling" to encompass statistical adjustments Congress had never set out to prohibit in the first place. Thus, if the Court is going to leave behind the plain text and embark on an analysis of what Congress "would have wanted," it would be a curious outcome to end up reading the Act as prohibiting something that — as far as the legislative history is concerned — was never even at issue.

2. The Court also should not be deterred from the best reading of the Census Act by any concern that the Census Bureau's planned methodology for conducting the 2000 Census is unconstitutional. That methodology constitutes an "actual Enumeration" within the meaning of Article I, Section 2, because it is a reasonably accurate method of numbering the population. This was the ordinary meaning of actual Enumeration at the time the Constitution was written, as is

strongly emphasized by the close linkage of the phrase with the textual requirement of apportionment according to the states' "respective numbers." The fact that the Constitution allows selection of any reasonably accurate method of conducting the census is further underscored by the textual prescription that the enumeration shall occur "*in such Manner as they [i.e., Congress] shall by Law direct*," which this Court has explained "vests Congress with virtually unlimited discretion" in conducting the census. *Wisconsin*, 517 U.S. at 17, 19 (emphasis added).

In addition to the constitutional text, the Framers' debates at the constitutional convention, other contemporaneous records, and the emergence of the phrase "actual Enumeration" during the convention demonstrate that the Constitution does not mandate use of a headcount. The Framers' core purpose in Article I, Section 2 was to ensure the equal representation of equal numbers of people. *Wesberry v. Sanders*, 376 U.S. 1, 13-14 (1964). They used the broad language "actual Enumeration" to enable Congress to fulfill that core purpose by choosing an accurate method, not to undercut that core purpose by requiring use of a headcount even if it could not accurately ascertain the number of people. In fact, prior to its submission to the Committee of Style the Constitution simply required that population "number[s] shall . . . be taken in such manner as the . . . Legislature shall direct," and that Committee did not intend to alter the meaning of the text in using the phrase actual Enumeration. 2 *The Records of the Federal Convention of 1787* 182-83 (Max Farrand ed. Yale 1966) ("Farrand") (report of Committee of Detail). Thus, the Constitution does not prescribe a particular method of conducting the census; it confers discretion on Congress to choose an accurate method. Indeed, in exercising that discretion from 1790 forward, Congress has never required census officials to conduct a pure headcount.

## ARGUMENT

### I. The Census Bureau's Planned Methodology Is Permissible Under the Census Act

The district court's conclusion -- that Congress in the 1976 Amendments precluded use of sampling techniques designed to make the decennial census more accurate and fair -- is fundamentally erroneous. Although purporting to rely at least in part on the "plain text" of the relevant provisions, the court did not and could not do so, because the relevant provisions of the Act, read together, show that Congress *authorized* the use of sampling techniques even for purposes of apportionment. To avoid that conclusion, the district court relied primarily on two principles of statutory interpretation: (1) that a statutory amendment should be presumed not to have changed "settled law," and (2) that when the best interpretation of a statutory amendment would effect a policy change that a court views as highly important or "sensitive," the court should reject that interpretation if Congress did not speak with crystalline clarity or confirm its intent in explicit legislative history.<sup>2/</sup> These principles are of dubious validity on their face. Moreover, even if valid in some circumstances, neither was appropriately applied in this case.

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<sup>2/</sup> The district court also gave brief mention to the doctrine that statutes should, where reasonably possible, be construed so as to avoid a constitutional issue. J.S. App. 64a. But as we show *infra*, there is no serious constitutional argument here, and the statutory analysis accordingly should not be skewed by an effort to avoid reaching the constitutional issue. See *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1228 (1998) (doctrine of constitutional avoidance need not apply "where a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt that the statute is constitutional"). The doctrine of constitutional avoidance also is inapplicable where, as here, a law is not "genuinely susceptible to two constructions after, and not before, its complexities [have been] unraveled." *Id.*; see *Salinas v. United States*, 118 S. Ct. 469, 475 (1998).



**A. The Plain Meaning of the Two Relevant Provisions of the Act Is that the Census Bureau Is Authorized to Use Sampling to Make the Decennial Enumeration More Accurate.**

The district court recognized that "interpretation of two provisions of the Census Act, sections 141(a) and 195, is ultimately determinative as to whether statistical adjustment to the initial headcount is permissible or proscribed." J.S. App. 46a. But it proceeded with a statutory analysis that did not fairly and fully consider both of those provisions. The court analyzed a whole variety of factors – the pre-1976 law, the text of section 195 (which it conceded to be ambiguous), presumptions against changes in "settled law," and even the legislative history of the 1976 Amendments, *see* J.S. App. 48a-59a -- *before* it once again made reference to section 141(a). This allowed the court to discount the significance of a provision that, according to the court itself, "standing alone appears to permit statistical sampling in congressional apportionment." J.S. App. 61a. Such an approach can only be described as one designed to obscure, rather than illuminate, the plain meaning of the two provisions Congress enacted.

In 1976, Congress enacted a revised version of section 141(a), the primary provision authorizing the decennial census, adding for the first time a reference to sampling:

The Secretary [of Commerce] shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, *including the use of sampling procedures* and special surveys.

13 U.S.C. § 141(a) (emphasis added). Thus, as amended, the section explicitly authorizes, without exception, the use of

sampling in the decennial census. Section 195, as amended, provides:

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195 (emphasis added). This section thus requires use of sampling wherever feasible, and then exempts the "determination of population for purposes of apportionment" from that requirement.

The district court read section 195 as a prohibition of sampling for apportionment purposes and then gave controlling weight to that section, on the theory that it is more "specific." J.S. App. 61a. But that proposition is itself debatable<sup>8/</sup> and, in any event, it is a court's duty, where reasonably possible, to read statutory provisions as harmonious rather than reading one provision as creating a gaping exception in another. *See, e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986) (interpreting two statutory sections based on "the familiar rule of construction that, *where possible*, provisions of a statute should be read so as not to create a conflict," *prior* to reaching the question of whether one statutory section was more specific) (emphasis added); *Rake v. Wade*, 508 U.S. 464, 471 (1993) (construing two statutory provisions to avoid the need

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<sup>8/</sup> Section 141(a) is itself extremely specific. It applies only to the decennial census, the core purpose of which is to gather data for purposes of apportionment, and it specifically authorizes use of sampling in that census. Section 195, by contrast, applies to sampling in all of the activities of the Census Bureau, not just the decennial census. This case thus bears little resemblance to those cited by the district court, J.S. App. 61a, in which a very general authorization clause was trumped by a specific exemption from that clause.

to read an exception into blanket statutory language and explaining that “[w]e generally avoid construing one provision in a statute so as to suspend or supersede another provision”); *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (“every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each”).

Here, there is no great mystery about how to harmonize sections 141(a) and 195. Section 141(a) authorizes sampling in connection with the decennial census. Section 195 requires sampling, where feasible, except with respect to apportionment. Taken together, these provisions are fairly read as *authorizing* the Bureau to use sampling to adjust the decennial enumeration for apportionment purposes, while *requiring* the Bureau, wherever feasible, to use sampling in all other contexts. See *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980). Thus, the district court posited a false conflict in deciding that section 195 carves out an exception to the authorization of sampling for the decennial census in section 141(a). It is “dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation,” *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Sturges v. Crowninshield*, 4 Wheat 122, 202 (1819)), and there certainly is no reason to adopt such an approach here. See also *Norfolk & Western Railway Co. v. American Train Dispatchers’ Ass’n*, 499 U.S. 115 (1991) (refusing to read exception into very broad statute despite arguments based on prior statute, legislative silence, and potentially conflicting statutory provisions).

To the contrary, the harmonized reading of sections 141(a) and 195 has much to recommend it. First, it is the most consistent with the text of section 141. As we have noted, the section expressly authorizes use of sampling, without exception, in the decennial census. Given the fact that the primary function

of the decennial census has always been to determine the population for purposes of congressional apportionment,<sup>2/</sup> this would have been a particularly odd way for Congress to express its intent to authorize sampling only for other purposes. Indeed, section 141(b) reinforces the linkage between the authorization of sampling and apportionment. It explains that the tabulation of population “required for the apportionment of Representatives” is the tabulation performed “under subsection (a) of this section” -- i.e., the tabulation for which sampling is explicitly authorized. 13 U.S.C. § 141(b).<sup>10/</sup>

The district court thus has good reason for concluding that section 141(a) “standing alone appears to permit statistical sampling in congressional apportionment.” J.S. App. 61a. Moreover, the 1976 Senate Report confirms that understanding. It states that “[n]ew language is added at the end of the subsection to encourage the use of sampling . . . in the taking

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2/ See J.S. App. 53a (“The apportionment function is, after all, the ‘constitutional purpose of the decennial enumeration.’”) (quoting 1998 Appropriations Act § 209(a)(2), 111 Stat. 2440, 2481).

10/ The House argued below that the reference to sampling in 141(a) was added only to make the subsection parallel with new section 141(d), which for the first time authorized a mid-decade census and which contains the same language authorizing sampling. In fact, however, precisely the opposite is true. The bill as first passed by the House in April 1976 authorized sampling for the decennial census but contained no reference to sampling in the mid-decade census. See 122 Cong. Rec. 9797 (1976) (§§ 141(a) and 141(c)). The sampling language was added to section 141(d) by the Senate, after the Commerce Department suggested that doing so would preclude any inference of an “intent to make the mid-decade censuses different from the decennial censuses in this regard.” *Mid-Decade Census Legislation: Hearing on S.3688 and H.R. 11337 Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Statistics*, 94th Cong., 25 (1976) (Letter from General Counsel of the Commerce Dept. to Chairman McGee, commenting on the House bill); see H. Conf. Rep. No. 94-1719, at 11, reprinted in 1976 U.S.C.C.A.N. 5463, 5479.



of the decennial census." S. Rep. No. 94-1256, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 5463, 5466. Two sentences later, it explains that "[i]t is for the purpose of apportioning Representatives that the United States Constitution establishes a decennial census of population." *Id.* at 5467.<sup>11/</sup> Here again, the linkage between the new authorization of sampling and apportionment could hardly have been missed.

Nor does the language of section 195 require a narrower interpretation. To reach that conclusion, one would have to read the "except" clause in section 195 as *prohibiting* use of sampling "for purposes of apportionment of Representatives in Congress." On its face, however, the "except" clause is simply an exception to a mandate imposed on the Bureau by the rest of section 195.<sup>12/</sup> And the district court correctly acknowledged that an exception to a mandate often simply serves to preserve *discretion*. The court cited examples of statutes "in which an exception from a mandate . . . does not constitute a prohibition in the area covered by the exception." J.S. App. 51a; *see id.* at 52a ("defendants' interpretation of the except/shall sentence structure is proper in some instances").

In fact, that is the *ordinary* meaning of the except/shall sentence structure present in section 195. Several examples

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11/ As the district court acknowledged, the Conference Report on the 1976 Amendments also expressly notes the addition of a reference to use of sampling in section 141(a), without suggesting any limitation on this authorization. J.S. App. 62a-63a (citing H. Conf. Rep. No. 94-1719 at 11 (1976), reprinted in 1976 U.S.C.C.A.N. 5463, 5479).

12/ The statute provides that the Secretary "shall, if he considers it feasible" authorize the use of sampling. This is the language of a mandate. *See Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily 'The language of command'") (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 962 (1998) (referring to "the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion").

suffice to show this: 1) A rule that, "except for federal holidays, all law clerks must report to work Monday through Friday" (which leaves the clerks discretion as to whether to report to work on federal holidays); 2) A sign saying that "except for trucks under 10 feet tall, all trucks must take the next exit" (which leaves trucks under 10 feet tall the discretion as to whether to exit); and 3) A rule that "except for students participating in varsity athletics, all students shall take at least one physical education class" (which leaves varsity athletes discretion as to whether to take a physical education class).

To be sure, as the district court went on to note, an exception to a mandate in common parlance sometimes conveys, indirectly, a prohibitory intent, because common sense tells us in some settings that there would be no other reason for the speaker to carve out the exception. Thus, a direction to a servant to take all the articles of clothing in a closet to the cleaners, except one specific item, would usually be interpreted as an indication that the speaker did not want that item taken to the cleaners.<sup>13/</sup> But here, common sense suggests there were perfectly logical reasons why Congress would have created an exception from a mandate for the purpose of leaving the Census Bureau discretion about whether and when to use sampling for apportionment purposes. As noted *infra*, Congress in 1976 was aware that the Bureau was working on, but had not yet perfected, sampling-based techniques for improving the accuracy of the decennial enumeration. It might very well have decided to leave to the "experts" the judgment call about when those techniques were ready to be deployed.

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13/ Although appellee and the district court have for some reason focused a great deal of attention on wedding dresses, the nature of the excepted item of clothing is not vital. The same common sense inference is justified if a speaker tells a servant to "take everything to the cleaners except my grey slacks."

More fundamentally, it is doubtful that it is *ever* appropriate to read a prohibition into a *statute*, when all that the legislature has done is to create an exception to a mandate. There is little reason to think that a legislative body, deliberately setting out to prohibit something, would do so in that way, *because that is not what the words say*. Indeed, neither appellee nor the district court was able to cite a single example of a statute in which Congress prohibited conduct by excepting it from a mandate. To be sure, there may be cases where the "except" clause reflects an understanding that a prohibition is contained in some other provision. But where that is not true, it should be a rare case, if any, in which a court infers an intent to create a new prohibition through enactment of an exception to a mandate.

Here, moreover, the most significant indicator of legislative intent points the other way. At the same time it was passing the revised section 195, Congress passed section 141(a), which on its face authorizes sampling for all purposes in the decennial census. It hardly makes sense that Congress would have relied on a court to read the "except" clause in section 195 as a limitation on section 141(a).<sup>14</sup>

There is also a final problem with the district court's notion that section 195 prohibits the use of sampling-based techniques to adjust the census for apportionment purposes. Contrary to the view of the district court, in enacting the except clause in section 195, Congress clearly was *not* aiming to preserve use of a "traditional" headcount as the sole acceptable method of conducting the census. This is evident from the grant of

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<sup>14</sup>/ Thus, for example, a command to a servant to "clean every surface in the kitchen, except the windows, by the end of each day" might on its own be interpreted as reflecting a desire that the windows be left alone. But that interpretation would be precluded if the homeowner *simultaneously* told the servant to use his or her own best judgment about undertaking any window cleaning tasks that needed to be done in the house.

discretion in section 141, which, under any theory, provides the Census Bureau discretion to adjust the census using any techniques that do not involve sampling, such as use of birth and death statistics. Indeed, the possibility of adjustment based on birth and death statistics was discussed favorably in congressional hearings in 1976 prior to enactment of amended section 141(a). See *1980 Census: Hearing Before the Subcomm. on Census and Population*, on the House Comm. on Post Office and Civil Service, 94th Cong., 5-7, 15, 18-19, 29-30 (June 1-2, 1976). Since section 141 allows the Bureau discretion to deviate from a headcount, the except clause in section 195 must have a purpose other than preserving a "traditional headcount." It is extremely implausible that a statute that allows the use of radical demographic techniques such as adjustment based on birth and death statistics would simultaneously prohibit the use of carefully designed sampling techniques that involve exhaustive canvassing of actual households.

For all of these reasons, sections 141 and 195 are best read as authorizing the Census Bureau to use sampling for apportionment purposes. That should be the end of the matter.

**B. The District Court Erred in Principle in Basing Its Analysis on Such Factors as the Presumption that Amendments to a Statute Did Not Change the "Settled Law" and Congress's Failure to Express Its Intentions with Glaring Clarity in the Statute and the Legislative History.**

Instead of interpreting the text of the statute enacted by Congress, the district court applied two non-textual principles of statutory interpretation reflecting its pre-existing intuition that Congress could not have meant what it said. That was a plain error. "In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's



meaning, in all but the most extraordinary circumstances, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). Indeed, it is not a court's task "to enter the minds of Members of Congress -- who need have nothing in mind in order for their votes to be both lawful and effective -- but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., concurring in part and dissenting in part).

Moreover, there could be no clearer example of the hazards associated with replacing analysis of what Congress said with speculation about what Congress must have "meant." The particular principles of statutory interpretation offered by the district court have little or no legitimacy. And even assuming those principles were valid, the district court's entire analysis of legislative intent, centered on its conclusion that the 1976 Amendments as interpreted by defendants and intervenors amounted to a "momentous" change, reflects a failure to understand how a member of Congress would have perceived the matter in 1976.

**1. The District Court Erred in Saddling Defendants with the "Burden" to Show that Congress Changed "Settled Law."**

The district court began with the assertion that the Census Act, until 1976, plainly prohibited use of sampling for apportionment purposes, and it then pronounced that defendants bore the burden of showing that the 1976 Amendments changed this "settled law." J.S. App. 49a, 59a. It thus addressed the question of statutory interpretation with a thumb on the scales favoring the view that Congress did not alter its position on sampling as applied to apportionment. But it makes no sense, as a general matter, to apply a presumption that a statutory amendment was intended to have no substantive effect. Indeed, the presumption ought to be the opposite. "When Congress acts

to amend a statute, we presume that it intends its amendment to have real and substantial effect." *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 397 (1995).

The sole case cited by the district court in support of its presumption against change of meaning -- *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) -- is utterly inapposite. It involved interpretation of one of the Federal Rules of Evidence, which replaced and largely codified the common law of evidence. In that context, the Court applied a presumption that the common law rule was left untouched by Congress. But there would be no reason to apply the same kind of presumption where the *language* of a federal statute has been deliberately changed.<sup>15/</sup>

Here, the district court and appellee do suggest that the changes to section 195 altered the law by "strengthen[ing] the call for sampling in non-apportionment information gathering." J.S. App. 54a. But they have no theory about why Congress simultaneously added an express authorization of sampling in the decennial census in section 141(a). After all, sampling, for non-apportionment purposes, was already fully authorized both under the 1957 version of section 195 and under its 1976 replacement. The *only* logical reason to add an authorization

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<sup>15/</sup> The same line of argument demonstrates that this case does not involve a suspect repeal by implication as the district court suggests. J.S. App. 55a. No one claims that the 1976 Amendments repealed some other statutory provision that Congress did not discuss. Here, Congress not only mentioned the statutory provision that it was "repealing," but it was that very provision -- section 195 -- that was the subject of the statutory amendment at issue. Cf. *Galvan v. Hess Oil Virgin Islands Corp.*, 549 F.2d 281, 288 (3d Cir. 1977) ("If the legislature has not directly amended a statute, it is only in the rarest case that a court should rule the statute amended.") (emphasis added).

in section 141(a) was to allow sampling for apportionment purposes.<sup>16/</sup>

**2. The District Court Also Erred in Demanding Exceptional Clarity of Draftsmanship, or Confirmation in the Legislative History, Before It Would Follow the Plain Meaning of the Words of the Statute.**

The district court gave even greater weight to its intuitive assessment that Congress would have viewed allowing sampling for purposes of apportionment as "dramatic" and "momentous," and that Congress thus would not have effected such a change (1) through "oblique," "indirect" and "subtle shifts of language" and (2) without confirming that intent in legislative history. J.S. App. 53a-59a. Here again, however, the court was on very shaky ground.

Thus, as to the question whether the statute is too "oblique" to effect a significant policy change, there is no legal or logical basis for rejecting the interpretation best supported by the terms of a statute, in a case involving a matter of substantial public import, on the theory that Congress would have been even

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<sup>16/</sup> In the district court, appellee contended that, even under defendants' theory, the authorization of sampling in the new mid-decade census in section 141(d) is wholly redundant in light of section 195, because the mid-decade census cannot be used for apportionment. It posited that the sampling language in section 141(a) was copied from section 141(d) and is therefore likely to be equally superfluous. In fact, however, the reference to sampling was inserted first in section 141(a), and was only added to section 141(d) later in the legislative process. See note 10 *supra*. Thus, there is every reason to give substantive significance to Congress's initial decision to add a reference to sampling to section 141(a). See *id.*

clearer if it had really meant what it said.<sup>17/</sup> Indeed, it is at least as plausible to apply the opposite principle -- *i.e.*, to adhere *more* closely to the rule that plain meaning controls statutory interpretation in cases where Congress would have considered the issue important. After all, it is precisely in such a situation that members of Congress are most likely to have paid attention to the precise terms of the proposed legislation being passed.

Equally insupportable was the district court's reliance on the absence from the legislative history in 1976 of a "clarion call announcing a fundamental change in the conduct of the only constitutional aspect of the census." J.S. App. 62a. As this Court explained in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980),

it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

See also *Sedima SPRL v. Imrex Co.*, 473 U.S. 479, 495-96 n.13 (1985) ("Congressional silence, no matter how 'clanging,'

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<sup>17/</sup> Nor is there any basis for imposition of some sort of "clear statement" rule here on the theory that the census and apportionment are a "traditionally sensitive area." See J.S. App. 571. This Court has in some instances required Congress to convey its purpose clearly when it intends to encroach on areas that were traditionally *the domain of the states*, see *United States v. Bass*, 404 U.S. 336, 349 (1971), but this case involves no comparable invasion of the prerogatives of another level of government. Indeed, a congressional decision to provide the Census Bureau the discretion to use sampling for apportionment reduces Congress' *own* power, not the power of a different institutional body. Moreover, even in the federal/state context, the plain statement requirement "does not warrant a departure from the statute's terms." *Salinas*, 118 S. Ct. at 475.



cannot override the words of the statute.”); *Moskal v. United States*, 498 U.S. 103, 111 (1990) (“This Court has never required that every permissible application of a statute be expressly referred to in its legislative history.”).

The district court did cite one case in which this Court relied on the absence of explicit reference to a particular topic in legislative history as some evidence of the meaning of a statute — *Chisom v. Roemer*, 501 U.S. 380 (1991). *Chisom*, however, is distinguishable because, unlike there, the statutory language at issue here provides a relatively clear answer about what Congress intended. A more pertinent ruling came a year after *Chisom*, when the Court stated:

The dissent believes petitioner’s position on this point to be supported by the history and structure of the ADA (sources it deems ‘more illuminating’ than a ‘narrow focus’ on the ADA’s language), because the old regime did not pre-empt the state laws involved here and the ADA’s legislative history contains no statements specifically addressed to state regulation of advertising. Suffice it to say that *legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning*.

*Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 n.2 (1992) (citations omitted) (emphasis added).<sup>18/</sup>

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<sup>18/</sup> The *Chisom* dissent aptly summarizes the flaws in the district court’s opinion in this case:

Today, . . . the Court adopts a method quite out of accord with th[e] usual practice. *It begins not with what the statute says, but with an expectation about what the statute must mean absent particular phenomena . . . and the Court then interprets the words of the statute to fulfill its expectation. . . . As method, this is just backwards, and however much we may be attracted by the result it produces in a*

### 3. The District Court’s Inferences Were Based on a Misunderstanding of History.

Even if the Court were inclined to alter its approach to interpreting statutes — and rely, like the district court, on an intuition that Congress could not have meant what it said — this would be an inappropriate case in which to do so. If a court is going to replace textual analysis with legislative psychoanalysis, it must at a minimum have a clear and complete understanding of how members of Congress would have understood what they were doing. In this case, the premises of the district court’s inference-based analysis — that allowing sampling in connection with apportionment would have been perceived as altering “settled law” in a “momentous” way — reflect assumptions about how Congress would have viewed the matter in 1976 that are at best highly questionable.

a. First, to the extent that members of Congress understood the 1976 Amendments as changing the law to authorize “sampling” for apportionment purposes, it cannot be assumed that this would have been viewed as a matter of huge importance. The logical explanation of this change is that Congress (1) had come to understand that the original version of section 195 stood as a potential barrier to the Census Bureau’s implementation of statistical adjustment techniques to make the census more accurate, and (2) chose to deal with this problem by giving the Bureau discretion. This, in turn, would not have seemed like a radical change in 1976. First, contrary to the assumption of the district court, Congress was not legislating against a 200-year background understanding that

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particular case, we should in every case resist it.

501 U.S. at 405 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.) (citation omitted) (emphasis added).

using statistical techniques to adjust the census was improper. Indeed, statistical sampling as a probability method did not exist until the late 19<sup>th</sup> century and did not begin to be perfected and applied to problems of census taking until the 1930s (Margo Anderson Decl. ¶¶ 11, 16(a),(b) (filed May 2, 1998), JA 347, 350-51; Fienberg Decl. ¶ 42, JA 337-78. Moreover, statistical techniques that could hope to eliminate the undercount in the decennial census did not begin to develop until the 1970s. Anderson Decl. ¶¶ 14-15, JA 349-50; *Decennial Census* at 21.<sup>19/</sup>

By that time, as discussed above, Congress was well aware of the Census Bureau's use of certain more limited statistical techniques -- "imputation," used since 1940, and the 1970 postal vacancy check and related adjustments -- to add individuals to the census who had been missed in the initial counts. See *supra* p. 5. But Congress never questioned the practice of imputing residents to occupied dwellings based on the demographic characteristics of their neighbors. And, after 1970, far from disapproving of that year's more extensive use of statistical techniques to add people to census counts, Congress issued a report summarizing the programs, explained that it was "most

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19/ As we note *infra*, the form of "sampling" Congress dealt with in 1957 was the "long form," which the Bureau distributes to only a small sample of the population. But by 1976 Congress had been presented with forms of "sampling" designed to supplement a headcount to make it more accurate. See *infra*. It would have been logical for Congress to recognize this change simply by authorizing the Census Bureau to use "sampling" for apportionment in 1976. In so doing, members would have had every reason to expect the Census Bureau to use sampling methods aimed at increased accuracy, not those, such as the long form, that would plainly decrease accuracy. The Census Bureau had never given any indication it was even considering use of long-form-type sampling for apportionment purposes, and the Bureau would, in any case, have been precluded from use of such a method by the constitutional requirement of reasonable accuracy. *Wisconsin*, 517 U.S. at 20.

impressed" with their effectiveness, and suggested the Census Bureau request additional funds to extend them. H.R. Rep. No. 91-1777, at 22, 41, 43 (1970).<sup>20/</sup>

Congress's implicit and explicit approval of these kinds of measures aimed at reducing undercounting was consistent with a long tradition of acceptance of innovations designed to improve accuracy -- including, for example, machine tabulation of the census and adoption of a mail-out census. Anderson Decl. ¶¶ 4, 5, 8-10, 13, JA 342-43, 345-47, 349; *Report to Congress* at JA 46-47. This tradition suggests that more systematic statistical adjustments of the kind currently proposed would not have been met with reflexive opposition -- at least until, as occurred more recently, the partisan advantages of maintaining an undercount came to be understood and valued by those who stood to gain.<sup>21/</sup>

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20/ In 1976, the Senate Report then stated that the 1976 Amendments made "numerous technical changes throughout title 13, United States Code, to conform more properly and closely to the current language and practices used by the Bureau of the Census." S. Rep. No. 94-1256, at 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5463, 5464 (emphasis added). See also *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980) ("There is nothing contained in 13 U.S.C. § 195, as amended, which would suggest that the Congress was interested in terminating the Census Bureau's practice, manifested in the 1970 census, of adjusting the census returns to account for people who were not enumerated."), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981).

21/ Congress's decision to grant discretion to the Census Bureau to use sampling in connection with apportionment is also consistent with a second historical trend. Congress has gradually ceded control over the census to the Bureau to the point where the present Census Act contains almost none of the details of the early Acts. Congress first created the Bureau of the Census in 1902 as a permanent federal agency. Margo J. Anderson, *The American Census: A Social History* 83 (1988). In the 1930 census, Congress provided the Census Bureau the authority to determine what questions would be asked as part of the census. See *id.* at 159; *Decennial Census: an Analysis* at 3. In 1957, Congress provided the Bureau discretion to use sampling outside



In fact, in 1976, while the bill amending sections 141 and 195 was pending in Congress, the House Subcommittee on Census and Population held hearings to discuss the newly recognized problem of the undercount. Members expressed grave concern about the undercount and urged the Census Bureau to find and implement ways to eliminate it. *1980 Census, supra*, at 1-2, 5-7, 15, 18-20, 29. The Bureau said it was working on the problem and might or might not have appropriate techniques available for the 1980 census. *See id.* at 19-20, 29. These included several statistical methods, among which was a version of dual system estimation with many similarities to the Census Bureau's current plans.<sup>22/</sup> The discussion during the hearings centered around the feasibility of making these new methods sufficiently accurate to use in the 1980 census. No member of Congress expressed any concern that use of such methods, if accurate, was somehow inherently suspect.<sup>23/</sup>

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the apportionment context. In 1964, Congress conferred on the Census Bureau the discretion to use a mail out census by repealing the existing requirement that enumerators visit each household. *See Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737 (1964); S. Rep. No. 88-1474 (1964), reprinted in 1964 U.S.S.C.A.N. 3308, 3308-09.* As a result, the Census Bureau was left with discretion over almost all of the aspects of the census that had been specifically controlled by Congress in early Census Acts. The 1976 Act was simply one more step in the same direction.

<sup>22/</sup> *See id.* at 5 (describing proposed method of dual systems estimation as involving "matching a sample of persons from an independent list" to determine the portion enumerated in the headcount and then adjusting the enumeration accordingly); *Decennial Census* at 21 (report considered by Congress in 1976 hearings describing proposed dual system estimation as using a "sample of persons").

<sup>23/</sup> *See Letter from Stuart Gerson, Asst. Atty. Gen., to Wendell L. Willkie II, Gen. Coun. of the Dep't of Commerce, at 16 (July 9, 1991) (Exh. 1 to Plaintiffs' Mot. for Summ. J. (filed Apr. 6, 1998)) ("Questioning of Bureau*

In sum, it was anachronistic for the district court to assume that Congress in 1976 could not have meant to give the Census Bureau discretion to decide whether to use sampling to make the census more accurate for apportionment purposes, or that such a change would necessarily have been perceived as momentous and controversial. That fact alone is sufficient to undermine reliance on the kinds of non-textual inferences drawn by the district court.

b. But there is also a more fundamental flaw in the district court's analysis. Even assuming, for the moment, that in 1976 Congress did not understand that it was changing the law with respect to "sampling" and apportionment, that does not mean members of Congress ever had a conscious intent to bar statistical techniques used to enhance the accuracy of the decennial enumeration. To the contrary, there is good reason to think that Congress did not believe such techniques had ever been barred. For that reason, if the Court is going to abandon textual analysis for an effort to discern what Congress really "meant," it would be curious at best to end up concluding that statistical adjustment is statutorily proscribed.

It is clear, first of all, that the "sampling" referred to by Congress when it enacted section 195 in 1957 was something quite different from statistical adjustments to improve the accuracy of an enumeration. When Congress in that year authorized "sampling" except for apportionment purposes, its purpose was to authorize the Census Bureau to use methods exemplified by the "long form," used to pose supplemental census questions to a small subset of a population randomly

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officials as to the statistical feasibility of adjusting population counts indicates congressional endorsement of Bureau efforts to develop sufficient technical expertise to carry out an adjustment. No congressional concern was expressed that Section 195 is a bar to adjustment for apportionment purposes.").

selected to represent the whole. *See supra* pp. 8-9. That, of course, is the usual meaning of the term. Indeed, at that time, the sampling-based methods currently proposed for adjusting the full count census had not even been developed.

Congress's narrow understanding of the term "sampling" in 1957 is also reflected in the phrasing of the original version of section 195. Congress exempted sampling used for apportionment purposes from the new authorization of sampling, but it did not directly prohibit that practice. The probable reason for this phrasing is that Congress had no reason for concern that the Census Bureau was about to begin counting the population using "sampling" in the long-form sense -- *i.e.*, by contacting only a small percentage of homes -- because such a methodology would likely have been barred by another statute as well as the Constitution.<sup>24/</sup> It could not have made the same assumption if it had understood "sampling" to include adjustments aimed at increasing accuracy.<sup>25/</sup>

Thus, there is no reason to believe that a member of Congress, in 1957, would have understood that section 195 had any prohibitory effect on statistical techniques that, instead of replacing a "headcount," could be used to improve its accuracy. Moreover, it is certainly possible the members had the same narrow understanding of the term "sampling" in 1976, when

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<sup>24/</sup> Until 1964, 13 U.S.C. § 25 required that enumerators visit each home included in the census. That requirement would have been inconsistent with a methodology extrapolating counts from visits to, for example, one home in six. Because of the likely inaccuracy of that methodology, moreover, it would have been highly questionable as a constitutional matter. *See* pp. 38-39 *infra* (the essence of the "actual enumeration" requirement is that the method must be reasonably calculated to produce an accurate count).

<sup>25/</sup> Statistical adjustments would not have violated 13 U.S.C. § 25, because they would have occurred in conjunction with visits by enumerators to each household. As we show *infra*, statistical adjustments are also permitted by the Constitution.

they amended sections 141 and 195. After all, by that time, there had been two more censuses using "imputation," without a hint of protest from Congress, and in 1970 the Census Bureau had used more extensive sampling-based adjustment techniques and received the approval of the House committee responsible for census oversight. It follows that even if Congress believed that the 1976 Amendments left in place the prior law with respect to "sampling" and apportionment, it might well also have believed that the amended Act allowed statistical adjustments for apportionment purposes.

There is a variety of circumstantial evidence supporting this view. First, as noted, even as the 1976 Amendments were pending, the House held hearings on the undercount, in which key members pressed the Census Bureau to complete development of statistical techniques to adjust the enumeration to eliminate the undercount. But even though some of these techniques were described as using sampling,<sup>26/</sup> no witness or member made reference to the existing or proposed statutory provisions addressing "sampling."<sup>27/</sup>

A year later, some of these same members of the House most involved in census issues introduced legislation to *require* use of statistical techniques to correct for the undercount.<sup>28/</sup> But

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<sup>26/</sup> *See supra*, n. 22.

<sup>27/</sup> The 1976 Amendments, as originally proposed in 1975, had provided for a mid-decade "sample survey," which was understood to involve contacts to a small percentage of the population. *See Proposals for a Mid-Decade Census: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 94th Cong., 1-5, 35 (1975). Thus, Congress was still using the term in the "long form" sense as of 1975.

<sup>28/</sup> H.R. 8871, 95th Cong. § 144 at 137 (1977) (introduced on August 7, 1977 by Cong. William Lehman and Patricia Schroeder), *reprinted in The Census Reform Act: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 95th



that bill, which never became law, included no provision amending section 195 to accommodate this change. In the meantime, the Census Bureau proceeded with development of techniques for adjusting the decennial enumeration, some of which were sampling-based, and experimented with such adjustment techniques during the 1980 census. See *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1095-1103 (S.D.N.Y. 1987) (describing these methodologies in detail).<sup>29/</sup>

As this discussion suggests, it is always perilous to interpret a statute based on assumptions about how a long-departed Congress would have felt about various interpretations, in part because it is so difficult to be sure that one is seeing the world the way members would have seen it at the time of passage. The only sure bet is to adopt the best reading of the words

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Cong., at 137 (1977); H.R. 10386, 95th Cong. § 143 (1977) (introduced on December 15, 1977 by Cong. Lehman, Schroeder, Solarz, and Howard, all of whom served on the Subcommittee on Census and Population). It is perhaps noteworthy, in view of the district court's emphasis on silence in the legislative history, that there was very little mention in the hearings on H.R. 8871 of the proposed requirement that the Census Bureau develop and implement methods for correcting its data to reflect the undercount.

<sup>29/</sup> In 1980, two courts and the Office of Legal Counsel concluded that the term "sampling" in section 195 does *not* encompass statistical adjustment of a full count. See *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980), *rev'd on other grounds*, 653 F.2d 732 (2d Cir. 1981); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); Memorandum from John Harmon, Asst. Atty. Gen. to Alice Daniel (Sept. 25, 1980) (Exh. 6 to Plaintiffs' Mot. for Summ. J. (filed Apr. 6, 1998)) (emphasis added). Two later OLC memoranda continued to take the position that statistical adjustment of the decennial census figures used for apportionment is not statutorily barred. See Letter from Stuart Gerson, Asst. Atty. Gen., to Wendell L. Willkie II, Gen. Coun. of the Dept. of Commerce, at 8-9 (July 9, 1991) (Exh. 1 to Plaintiffs' Mot. for Summ. J. (filed Apr. 6, 1998)); Memorandum from Walter Dellinger, Asst. Atty. Gen., to the Solicitor General, at 12 (Oct. 7, 1994) (Exh. 7 to Plaintiffs' Mot. for Summ. J. (filed Apr. 6, 1998)).

Congress used, and let Congress to fix the problem if it disagrees. And it would be particularly ironic to depart from that method in *this* case, in the manner urged by the House, for several reasons.

First, the House is not consistent in its methodology. It asks the Court to look beyond the plain language of the current Act, on the theory that Congress could not have really "meant" to enact what plainly is the best interpretation of that language. In other words, it says that the change of meaning brought about by the 1976 Amendments was inadvertent and should not be given effect. But, in arguing, in essence, that the 1957 version of the law should be given effect, the House simultaneously relies on a definition of the term "sampling" that goes beyond what Congress "meant" when it passed section 195 in 1957. That broader definition may be consistent with plain meaning, but the application of section 195 to bar statistical adjustment of a full enumeration (and not merely surveys in the tradition of the long form) was surely unanticipated in 1957 — and in 1976 as well.

The fact is that neither the House nor the district court — while relying on the paucity of legislative history supporting our view of the statute — has pointed to a shred of legislative history suggesting that Congress ever affirmatively intended to bar adjustments. The House's argument thus amounts to little more than picking and choosing when to rely on plain meaning and when to abandon it, depending on which method will serve the goal of preventing the Census Bureau from more accurately counting the American people.

But the House is the party with the least standing to ask this Court to abandon its commitment to interpretation based on plain meaning in favor of inferences about underlying congressional intent. Congress, after all, is in the midst of an ongoing debate about the Census and sampling, and could clarify the law at any time. The House leadership brought this

lawsuit in the hope that it can achieve its desired political result without having to enact a new law. This Court should not go out on a methodological limb to save the legislative branch from having to bear that burden.

**II. The Constitution Does Not Restrict the Methods That Can Be Used To Enumerate the Population for Purposes of Apportionment, but Requires Only a Reasonable Relation to Achieving Equal Representation for Equal Numbers of People.**

The House contended in the district court that the constitutional requirement of an "actual Enumeration" in Article I, Section 2 precludes the Census Bureau from using statistical sampling to produce counts used for apportionment, even if those counts will be *more* accurate. In the House's view a traditional count that misses 10%, 30% or even more of a state's population is more of an actual Enumeration of that population than an entirely accurate count based on another method. But the House's contention is belied by both the language and structure of Article I, which reflect the fundamental constitutional purpose of the census: to provide the population data necessary to ensure "equal representation for equal numbers of people." *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 459 (1992) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)); *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992). Indeed, when this Court evaluated in *Wisconsin* whether the Secretary's failure to adjust the census bore a "reasonable relationship to the accomplishment of an actual enumeration of the population," 517 U.S. at 20, it was evaluating whether the decision bore a reasonable relationship to accuracy, *id.* at 20-24, not whether the decision bore a reasonable relationship to use of a "headcount."

**A. The Language and Structure of Article I, Section 2 Demonstrate that the Census Bureau's Planned Methodology is Constitutional.**

The Framers used the phrase "actual Enumeration" in accord with its ordinary meaning to describe any accurate method of ascertaining population rather than a particular method. At the time the Constitution was written, the meaning of "enumeration" was "[t]he action of ascertaining the number of something; *esp.* the taking a census of population." 5 *Oxford English Dictionary* 311 (2d ed. 1989); *see also, e.g.*, William Perry, *The Royal Standard English Dictionary* (Worcester, MA 4th ed. 1796) (defining enumeration as "a numbering or counting over" and defining enumerate as "to number"); John Elliott, *A Selected, Pronouncing and Accented Dictionary* (Suffield, Ct., Gray for Cooke, 1800) (defining "enumerate" as "to number.").<sup>30</sup> Similarly, "actual" meant "[i]n action or existence at the time; present, current," as well as "[e]xisting in act or fact." 1 *Oxford English Dictionary* 132 (2d ed. 1989); *see also, e.g.*, Perry, *supra* (defining "actual" as "real, in act"). Thus, an "actual Enumeration" of the population is simply the action of ascertaining the number of people that exists in fact at the present time. *See Carey v. Klutznick*, 508 F. Supp. at 414 (consulting dictionary definitions and concluding that language of Article I, Section 2 "indicates an intent that apportionment be based on a census that most accurately reflects the true population of each state").

The Framers' intent is made even plainer by the close link between this phrase and a second component of Section 2, the directive that apportionment be based on the states' respective numbers:

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<sup>30</sup> Conversely, "census" has long meant "[a]n official enumeration of the population of a country or district, with various statistics relating to them." 2 *Oxford English Dictionary* (1933).



Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they [i.e., Congress] shall by Law direct.

U.S. Const. art. I, § 2, cl. 3. The requirement that Representatives be apportioned among the states “according to their respective Numbers,” clearly presumes that apportionment will be based on the *actual number* of people in each state, not on a fictional number derived from a specific methodology that is more inaccurate than it needs to be.<sup>31/</sup> The subsequent requirement that “[t]he actual Enumeration” shall occur at specified times is focused on the timing of gathering those population numbers, not the method for doing so. As the subject of that sentence, the phrase “[t]he actual Enumeration” clearly refers back to “their respective Numbers” and simply

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<sup>31/</sup> Congress must, therefore, choose a census methodology that accurately assesses those numbers. Although this Court has been loath to intervene in Congress’s decision as to how to conduct that assessment because accuracy does not provide a rigid measure for courts to determine whether the census satisfies constitutional norms, *see, e.g., Wisconsin*, 517 U.S. at 14, 18, there is no doubt that Congress has a duty accurately to assess those numbers and that Congress’s choice of a methodology that does not at least bear “a reasonable relationship” to an accurate assessment would exceed the scope of the deference due to it. *See, e.g., id.* at 20; *Montana*, 503 U.S. at 464. Indeed, the Constitution embodies a preference for distributive accuracy. *Wisconsin*, 517 U.S. at 20. Yet under the House’s interpretation, Congress would be required to use a headcount even if current demographic trends eventually result in a situation where a headcount is entirely inaccurate and does not at all bear a reasonable relationship to an accurate assessment. Thus, the House’s view potentially brings the “actual Enumeration” requirement into direct conflict with the “respective Numbers” requirement even though the two provisions are intended to operate symbiotically.

means the actual process of gathering these numbers.<sup>32/</sup> The modifier “actual” indicates that the apportionment must be based on a process showing the states’ *real* populations, or actual numbers, not on guesswork or conjecture about what those populations are.

The constitutional text further emphasizes the wide latitude Congress has in choosing an accurate method of ascertaining respective population numbers, by prescribing that the actual Enumeration shall occur “*in such Manner as they [i.e., Congress] shall by Law direct.*” As this Court has explained, “[t]he text of the Constitution vests Congress with *virtually unlimited discretion* in conducting the decennial ‘actual Enumeration, . . . [and] there is no basis for thinking that Congress’ discretion is more limited than the text of the Constitution provides.” *Wisconsin*, 517 U.S. at 19 (emphasis added) (footnotes omitted).<sup>33/</sup> It follows that it is wholly implausible to suggest that Congress simultaneously used the phrase “actual Enumeration” to mandate a particular method.

This reading is further confirmed by the remainder of Article I, Section 2, which effected an initial apportionment of Congress. Because the Constitution did not require an “actual Enumeration” of the population to be made until three years after Congress’s first meeting, Section 2 provided that “until such enumeration shall be made, the State of New Hampshire

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<sup>32/</sup> The reference-back is made plain by the use of the definite article (“*The actual Enumeration*”), rather than the indefinite article, which would be expected if “actual Enumeration” had no referent earlier in the text of Section 2 itself.

<sup>33/</sup> The House’s claim that the text conveys only the discretion to choose different methods of conducting a headcount would confine Congress’s discretion to a very narrow sphere. Such a reading cannot be reconciled with the sweeping language of the text which emphasizes the Framers’ intent that Congress’s discretion be broad.

shall be entitled to chuse three [Representatives], Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five," etc. U.S. Const. art. I, § 2, cl. 3. This interim assignment of the number of Representatives was based on conjecture as to states' likely population growth and wealth, on political compromise between different states, as well as on conjecture as to states' current populations, which were imperfectly known. 1 Farrand at 559-70. There was not even an attempt to use "principles or calculation" to estimate accurate numbers from available data and thus the initial apportionment did not "appear to correspond with any rule of numbers," *id.* at 559 (Sherman). The Framers recognized that the initial apportionment was "little more than a guess," *id.* at 560 (Morris), or a "conjectural ratio," *id.* at 578 (Mason). Thus, when they chose to base subsequent apportionments on an "actual Enumeration" of the states' population, what they rejected was apportionment based on a conglomeration of factors that were quantified through pure guesswork. The contrast with the initial apportionment mechanism makes clear that the criterion of an "actual Enumeration" is its accuracy and reliability as a measure of population, not the method used.

**B. The Framers' Debates and Early History of the Census Demonstrate that the Census Bureau's Planned Methodology is Constitutional.**

The Framers' use of the term actual Enumeration to prescribe an accurate numbering of the population is evident not only from the constitutional text, but also from the Framers' debates at the Constitutional Convention and other contemporaneous records. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Supreme Court carefully canvassed these sources to determine the meaning of Article I, Section 2 and concluded that it requires congressional districts within a state to be drawn so that each has essentially the same population as the others. In reaching this conclusion, the Court noted that under the Great

Compromise reached by the Framers, the interests of large and small states were reconciled by giving each state equal representation in the Senate, while apportioning representation in the House of Representatives among the states "according to their respective Numbers." U.S. Const. art. I, § 2, cl. 3; *Wesberry*, 376 U.S. at 12-13. Thus, "equal representation in the House for equal numbers of people" is the core "principle solemnly embodied in the Great Compromise." *Id.* at 14.

The Framers adopted the requirement of an actual Enumeration every ten years and the requirement of apportionment based on the states' "respective numbers" in order to fulfill this core purpose. As *Wesberry* explained:

The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent "people" they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure "fair representation of the people," an idea endorsed by Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives.

*Id.* at 13-14 (footnotes omitted); *see also id.* at 14-18. As *The Federalist* explained, "Within every successive term of ten years a census of inhabitants is to be repeated. The unequivocal objects of these regulations are . . . to readjust . . . the apportionment of representatives to the number of inhabitants . . . [and] to augment the number of representatives at the same period." *The Federalist No. 58*, at 356 (Madison) (Clinton Rossiter ed. 1961).

Given the Framers' decision to base apportionment "solely" on the "number of inhabitants," it makes little sense to conclude



that they forbade use of the method best designed to provide accurate information about the "number of inhabitants" in each state. As one court observed, "[i]t may be that today an actual headcount cannot hope to be an accurate reflection of either the size or distribution of the Nation's population. If so, it is inconceivable that the Constitution would require the continued use of a headcount in counting the population." *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); see also *City of New York v. United States Dep't of Commerce*, 739 F. Supp. 761, 767 (E.D.N.Y. 1990) ("It is no longer novel or, in any sense, new law to declare that statistical adjustment of the decennial census is both legal and constitutional.").

The House bases its interpretation on a secondary purpose that it attempts to extract from the Framers' debates -- that of preventing political manipulation by mandating the use of a headcount even if it is less accurate than competing methods. But there is not a shred of evidence to support this claim. The political manipulation about which the Framers were concerned was the problem of "rotten boroughs," which results when places having representation in a legislature refuse to relinquish power by reapportioning as population shifts elsewhere. See 1 Farrand at 584 (Madison). They therefore advocated "fixing numbers for the perpetual standard of Representation," *id.* at 585 (Madison, emphasis added), because this "permanent & precise standard" would compel reapportionment as population shifted, *id.* at 578 (Mason), and in this respect "t[ie] the[] hands" of future Congresses, *id.* at 580 (Randolph). Obviously, to the extent that statistical methods are more accurate than an uncorrected "headcount," sampling furthers the Framers' goal of requiring reapportionment according to the principle of equal representation for equal numbers of people.

Moreover, a headcount is not less politically manipulable, and may be more politically manipulable, than statistical

sampling. In a headcount, decisions as to the resources to devote to counting particular areas -- or even whether to count particular individuals, *see supra* n. 1 -- can be easily manipulated to affect results, and a headcount, unlike statistical sampling, does not have known error rates. *See supra* p. 8.

In any event, the House's claim that the Framers were afraid to give Congress discretion in choosing a census methodology is entirely inconsistent with prior holdings of this Court emphasizing that the exercise of discretion by Congress (or its delegates) may occur even after the raw census numbers are in and the effect on apportionment is known with certainty. *See Wisconsin*, 517 U.S. 1 (1996) (upholding Secretary's after-the-fact decision not to adjust 1990 "headcount"); *Franklin*, 505 U.S. at 796-802 (holding that even after Secretary of Commerce reports census results to President, President may make policy judgments -- such as whether overseas federal employees should be included in census totals -- that can change those results); *Montana*, 503 U.S. at 463-66 (holding that Congress may select among several apportionment formulas as long as the chosen formula is "open to . . . change at any time"). Indeed, for most of the Nation's history, Congress did not select the precise formula to be used in apportioning congressional seats among the states until it had the census results before it and could calculate precisely how each of the various formulas would affect the number of seats that each state would receive. *See id.* at 448-53. *See generally* Anderson, *American Census*, *supra*. It would be odd indeed if the Framers had sought to prevent political manipulation by severely constraining Congress's discretion in the conduct of the census, but then let Congress freely choose among several apportionment formulas once the census results were in.

The emergence of the phrase "actual Enumeration" during the Philadelphia Convention underscores that the imposition of such a severe constraint is not what Congress intended. As

*Wesberry* observed, Randolph first proposed that a periodic "census" be taken so that reapportionment of the House (and taxation) could be based on the states' actual populations. See *supra*. Later, when the Committee of Detail reduced the various resolutions passed by the Convention into the first draft of the Constitution, its draft expressed the requirement of a periodic census in language simply stating that "[the] number [of inhabitants] shall . . . be taken in such manner as the . . . Legislature shall direct." 2 Farrand at 182-83 (report of Committee of Detail).<sup>34</sup> This language plainly gave Congress complete discretion in choosing the method by which the "number" of inhabitants "shall . . . be taken," and it remained intact throughout the remaining debates at the Convention. The Committee of Style then reworked the entire draft Constitution. In doing so, it replaced the language of the original draft ("which number shall . . . be taken") with the phrase "actual enumeration." *id.* at 590 (report of Committee of Style). Finally, for two days after the Committee of Style made its report to the whole Convention, that body reviewed the Committee's proposal paragraph-by-paragraph to ensure that the reworking did not alter the meaning of the language to which the Convention had earlier agreed. See *id.* at 605, 610, 612. Not a single delegate suggested that the phrase "actual enumeration" meant something different from the previously approved language directing that the "number [of inhabitants] shall . . . be taken."

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<sup>34</sup> "The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within six years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct." *Id.* (emphasis added).

Finally, although the House contends that its reading is supported by the history of the early censuses, the opposite is actually true. The House asserts that an actual Enumeration requires a headcount, because the meaning of this phrase is to "reckon up singly" or "to count[] by naming each particular." Plaintiff's Motion for Summ. J. at 48. But if the House's definition is correct, then not a single census, from 1790 to 1990, has been constitutional. Censuses from 1790 through 1830 relied on the family as the unit of counting. The head of the family was asked how many individuals were in the family and this number was recorded, but the names of individual family members were not recorded. See, e.g., Anderson, *American Census*, at 13; Act of March 1, 1790, ch. 2, 1 Stat. 101-02. Thus, population numbers were not arrived at by "reckoning up singly" and "naming each particular" but rather family by family. Moreover, when a member of the household could not be found, census-takers historically relied on information from neighbors, see, e.g., Act of March 3, 1879, ch. 195, 20 Stat. 473, 475, *Decennial Census* at 44, or, since 1940, have statistically imputed demographic characteristics to the household based on the characteristics of neighbors. See *supra* p. 5. Given that census data have always been derived from reports from third parties, the House's claim that the decennial census has always been a "headcount" becomes even more difficult to maintain. At what point does reliance on third-party information no longer constitute a "headcount"? Finally, of course, because no census has ever been entirely accurate, there has never been a census in which all individuals have been "reckon[ed] up;" every census has made assumptions about the whole population based on a "sample" of that population. The fact that early Congresses required use of a census methodology that did not meet the House's definition of "actual



Enumeration" strongly suggests that this definition is not correct.<sup>35/</sup>

In sum, there is not one iota of evidence suggesting that the Census Bureau's prior method is an "actual Enumeration" of the population and that any other method is not.<sup>36/</sup> This Court should not read a requirement of *inaccuracy* into the

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<sup>35/</sup> Inferences drawn from early censuses only run in one direction. Contrary to the claims of the House, the fact that early Congresses adopted a particular method of taking the census suggests that they thought that this method was constitutional but hardly suggests that they thought that other methods were not constitutional. Congress's decision to exercise its discretionary power in one way does not *exclude* the power to exercise that discretion in some other way. This Court has, for example, upheld the Secretary's 1990 decision to *depart* from longstanding practice by including overseas federal employees in the census results for their home states. *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

<sup>36/</sup> The House also argued below that sampling is barred by the Fourteenth Amendment, which requires that representatives be apportioned according to the states' "respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2. But in this context, the verb count clearly means "[t]o include in the reckoning; to reckon in." 2 Oxford English Dictionary 1055-56 (1933). Thus, the Amendment specifies that the numbers that serve as the basis of apportionment are to include all persons. This reading is confirmed by the manifest purpose of the "whole persons" clause of the Fourteenth Amendment, which was to amend the "three fifths" clause of Article I, Section 2, and thus to ensure that each person's existence is to be given equal weight when seats in Congress are apportioned. *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). Indeed, it would be ironic in the extreme if the Amendment, which was intended to give freed slaves equal weight when apportioning the House of Representatives, should now be read to require a method of enumeration that indisputably underrepresents African-Americans, depriving them of an equal voice in the halls of Congress.

Constitution, and should not allow the House's weak constitutional argument to skew its statutory analysis.<sup>37/</sup>

## CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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<sup>37/</sup> Even if the term "actual Enumeration" somehow required a headcount, the Census Bureau's plans would be constitutional, because the Census Bureau intends to conduct such a headcount by contacting every known household. Nothing in the text requires the unadjusted results of "the actual Enumeration" to be used as the sole basis for apportionment. Indeed, the text requires that apportionment be based on the "respective Numbers" in the different states. Thus, the Census Bureau's plan to statistically adjust the results of the headcount to more accurately reflect the "respective Numbers" of the states is a perfectly appropriate basis from which to apportion representatives regardless of the meaning of actual Enumeration.

OCT 6 1998

CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

*Appellants,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

*Appellees.*

On Appeal from the United States District Court  
for the District of Columbia

**BRIEF OF APPELLEES CITY OF LOS ANGELES,  
ET AL IN SUPPORT OF APPELLANTS**

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## QUESTIONS PRESENTED

1. Whether the Census Act, 13 U.S.C. §§ 1, *et seq.* (1994 & Supp. II 1996), prohibits the Secretary of Commerce from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.
2. Whether the Census Clause of the Constitution, Article I, Section 2, Clause 3, which requires Congress to conduct an "actual Enumeration" of the population, prohibits the use of statistical sampling in determining the population for the purpose of apportioning Representatives among the States.
3. Even if statistical sampling may not be used to adjust the census for apportionment purposes, whether the Census Act requires that it be used to adjust the census data for other purposes, such as the distribution of federal funds and redistricting, where -- as is the case here -- the Secretary has determined that statistical sampling is feasible.

## PARTIES TO THE PROCEEDING BELOW

### 1. APPELLANTS (defendants in the District Court):

The United States Department of Commerce; William M. Daley in his capacity as Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, in his capacity as Acting Director of the Bureau of the Census.

### 2. APPELLEE (plaintiff in the District Court):

United States House of Representatives.

### 3. APPELLEES (intervenor-defendants in the District Court):

**City of Los Angeles, et al.:** City of Los Angeles, CA; State of New Mexico; City of New York, NY; County of Los Angeles, CA; City of Chicago, IL; City and County of San Francisco, CA; County of Miami-Dade, FL; City of Inglewood, CA; City of Houston, TX; City of San Antonio, TX; City and County of Denver, CO; City of Long Beach, CA; City of San Jose, CA; City of Stamford, CT; City of Oakland, CA; City of Cudahy, CA; County of Santa Clara, CA; County of San Bernardino, CA; County of Alameda, CA; County of Riverside, CA; U.S. Conference of Mayors; League of Women Voters of Los Angeles; and the following Members of Congress -- Carolyn Maloney; Christopher Shays; Tom Sawyer; Rod Blagojevich; Bobby Rush; Luis

Gutierrez; John Conyers, Jr.; Jose Serrano; Cynthia McKinney; Charles Rangel; Donald Payne; Howard Berman; Xavier Beccera; Loretta Sanchez; Julian Dixon; Henry Waxman; Maxine Waters; Esteban Torres; Sheila Jackson Lee. After this initial group was allowed to intervene, the following parties were granted permission by the District Court to intervene and, being represented by the same counsel, joined with the initial group: City of Detroit, MI; City of Bell, CA; City of Gardena, CA; City of Huntington Park, CA; and the following Members of Congress -- Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez; Carlos Romero-Barcelo.

In compliance with Rule 29.6, none of the City of Los Angeles, *et al.* appellees are parent corporations, subsidiaries or affiliates of any entities that have outstanding securities in the hands of the public.

### 4. APPELLEES (intervenor-defendants in the District Court):

**Richard A. Gephardt, et al.:** Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M. Slaughter; Bennie G. Thompson, individually and in their official capacities as Members of the United States House of Representatives.

### 5. APPELLEES (intervenor-defendants in the District Court):



**Legislature of the State of California, et al.:** Legislature of the State of California; the California Senate; John Charles Burton, individually and as President Pro Tempore of the California Senate; the California Assembly; and Antonio Villaraigosa, individually and as Speaker of the California Assembly.

6. **APPELLEES** (intervenor-defendants in the District Court):

**National Korean American Service & Education Consortium, Inc., et al.:** National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra.

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

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No. 98-404

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UNITED STATES DEPARTMENT OF COMMERCE, *ET AL.*,  
*Appellants,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *ET AL.*,  
*Appellees.*

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On Appeal from the United States  
District Court for the District of Columbia

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BRIEF OF APPELLEES CITY OF LOS ANGELES,  
*ET AL.* IN SUPPORT OF APPELLANTS

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STATEMENT OF THE CASE

A. Introduction

Appellees City of Los Angeles, *et al.* ("Los Angeles-Appellees") intervened as defendants in the district court. The Los Angeles-Appellees are a non-partisan group that includes the State of New Mexico, some of America's most populous cities and counties, the U.S. Conference of Mayors, the League of Women Voters, and a bipartisan group of more than twenty Members of Congress, including the bipartisan co-chairs of the House Census Caucus. This

diverse assembly of government entities, individuals and organizations joins with appellants and the other intervenor-defendant appellees in defending the use of statistical sampling in the decennial census. If statistical sampling is permitted, the Census Bureau will conduct the most accurate and cost-effective census possible in the year 2000, and reverse the hardship and unfairness that results from differentially undercounting certain groups of Americans -- including minorities, children, renters and the poor -- in the census.

**B. The Decennial Census Is Plagued by the Invidious Problem of the Differential Undercount.**

The decennial census never has been a headcount of the population. Since its inception in 1790, Americans have been undercounted. See Joint Appendix ("J.A.") at 344-45 (Declaration of Margo Anderson ("Anderson Decl.") ¶¶ 7-8).<sup>1</sup> Over the years, the Federal Government has tried to make the census more accurate, but has never succeeded entirely. See J.A. at 46-47 (*The United States Department of Commerce, Bureau of Census, Report to Congress -- The Plan for Census 2000* (revised and reissued August 1997) ("Census 2000")); *id.* at 345-50 (Anderson Decl. ¶¶ 8-15).

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<sup>1</sup> Professor Margo Anderson, Professor of History and Urban Studies at the University of Wisconsin-Milwaukee, is universally recognized as the preeminent authority on the history of the U.S. Census. She testified by declaration in the district court, concluding that the history of the U.S. Census has been one of constant innovation in an effort to improve accuracy, and that the use of statistical sampling would be just another step in this evolutionary process. See generally J.A. at 342-52 (Anderson Decl. ¶¶ 1-17).

In the modern era, however, a problem more invidious than undercounting emerged: differential undercounting. Differential undercounting is the difference in the undercount of one subgroup of the population, for example, African-Americans, compared to another subgroup, for example, non-African-Americans. See *Wisconsin v. City of New York*, 517 U.S. 1, 7 (1996). Certain population subgroups -- including ethnic and racial minorities, recent immigrants, renters, children, and the poor -- are consistently undercounted at much higher rates than other groups. See generally J.A. at 48-52 (*Census 2000*). For instance, between 1940 and 1980, while the undercount of the general population apparently decreased, the undercount of African-Americans remained at three to four percentage points above the net undercount of non-African-Americans. See *Wisconsin*, 517 U.S. at 7 ("In the 1980 census, for example, the overall [net] undercount was estimated at 1.2%, and the undercount of blacks was estimated at 4.9%."); J.A. at 49 (*Census 2000*).

This Court has recognized that "[b]ecause the heavily undercounted groups are not evenly distributed over the country, the differential rates of undercounting produce divergences between the actual relative population of particular areas and those indicated by the census." *Kirkpatrick v. Preisler*, 394 U.S. 526, 539 n.3 (1969) (Fortas, J., concurring). These "particular areas" include the government entities filing this brief, such as the State of New Mexico, home to many Native Americans, Hispanics, and the rural poor; the urban centers of Los Angeles and New York, the port of entry for many recent immigrants and home to growing minority populations; counties like Miami-Dade, Florida and Alameda, California, which have large



Hispanic populations; and cities like Inglewood, California where African-Americans comprise the majority.

**C. The 1990 Census: the Trend Towards Greater Accuracy Reversed.**

The 1990 census took a large "step backward on the fundamental issue of accuracy." J.A. at 47-48 (*Census 2000*). Despite being the most costly and purportedly comprehensive census ever undertaken, the 1990 census was the first census in forty years to be less accurate than its predecessors. Gross errors resulted in more than 26 million people being improperly counted: approximately 11 million people were erroneously included ("overcounted"), while roughly 15 million people were not counted at all or not counted in the correct block. *Id.* at 374-75 (Declaration of Stephen Elliot Fienberg ("Fienberg Decl.") ¶¶ 37-39).<sup>2</sup> This yielded a net national undercount of approximately 4 million Americans -- or 1.6% of the population -- significantly worse than in 1980. *Id.* at 375; *see also id.* at 40, 48 (*Census 2000*).

Not surprisingly, the differential undercount also worsened. *Id.* at 47-48 (*Census 2000*). The 1990 undercount rate among African-Americans was six times greater, among

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<sup>2</sup> Professor Fienberg is a Maurice Falk University Professor of Statistics and Social Sciences at Carnegie Mellon University, and one of the country's leading experts on the use of statistical sampling in the U.S. Census. He has authored 14 books and more than 200 papers on the subject of statistical methods. The statistical sampling techniques planned for the 2000 census are described in some detail in his declaration. *See generally* J.A. at 353-80 (Fienberg Decl. ¶¶ 1-45).

Hispanics (all races) seven times greater, and among Native Americans living on reservations, more than seventeen times greater than among non-Hispanic Whites. *Id.* at 49. These disturbing differential undercounts also occurred among children and renters. Despite being only 26 percent of the national population, children under the age of 18 accounted for 52 percent of the undercount in 1990. *Id.* at 48-49. While urban homeowners had a net undercount of 0.09 percent in 1990, renters in urban and rural areas had a net undercount of 4.17 percent and 5.92 percent, respectively. *Id.* at 49.

The enumeration methods employed by the Census Bureau in 1990 caused populations with high concentrations of minority and low-income residents to experience undercounting at levels significantly higher than the national average. This was determined by a post-enumeration survey, a form of statistical sampling, conducted by the Census Bureau following the 1990 census. According to final results of the survey, published in August 1992, the State of New Mexico suffered the largest percentage undercount of any State, and many of the cities and counties among the Los Angeles-Appellees found themselves at the top of the list of the most undercounted populations.<sup>3</sup>

The Census Bureau candidly acknowledges that the societal trends that led to the differential undercounting in the 1990 census likely will cause even greater inaccuracies in the 2000 census, unless statistical sampling methods are used to adjust the census results. *See id.* at 42, 54.

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<sup>3</sup> *See* Table 1 in Appendix.

**D. Differential Undercounting Is More Than Just Bad Math; It Adversely Affects the Lives of Real People.**

While the sheer magnitude of the number of persons missed in the past is troubling, the effects of the differential undercount are devastating. The Census Bureau concedes:

[a]s a result of the inaccuracy in the 1990 Census, many Americans were denied an equal voice in their government. Federal spending employing population-based formulas -- for schools, crime prevention, health care, and transportation -- was misdirected.

*Id.* at 49.

The groups of people who are most severely undercounted live mostly in America's urban centers, and in poor rural areas. Because the apportionment of everything from Congressional districts to city council seats depends (at least in part) on census data, those who live in undercounted areas suffer from vote dilution: they are denied the constitutional guarantee of "one-person, one-vote."

In addition, differential undercounting causes grave financial harm to the States and local governments where the undercounted reside. Among other things, distribution of federal funds to States and local governments often depends on census figures. Consequently, if a State, city, or county's population is undercounted, it will lose millions of dollars each year.<sup>4</sup> Yet, it still must provide mandated

<sup>4</sup> E.g., Declaration of Joseph J. Salvo (Exhibit C of the Affidavits in Support of Motion to Intervene as Defendants of Intervenor City of Los Angeles, et al. (filed Apr. 3, 1998) ("Affidavits in Support") ¶ 17 (City of New York anticipates losing

services to its residents, even those who were not counted. This hurts all of its residents, whether they are among the undercounted groups or not, because funds that would have been used for other programs must be diverted to provide mandated services to those who were not counted. Thus, the consequences of this underfunding impact both mandated programs and discretionary programs serving all residents.<sup>5</sup>

The Census Bureau recognizes that "[t]aking Census 2000 the same way the 1990 census was taken would result in an expected undercount of at least 1.9 percent of the population (more than 5 million people) and would cost at least \$675 million more than the current plan." J.A. at 43 (*Census 2000*). Population undercounts in the 2000 census are expected to continue to cost affected states, cities and counties millions in lost federal funding.<sup>6</sup> Unless the

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approximately \$100 million dollars)); Affidavit of Wayne Bannister (Exhibit D of Affidavits in Support) ¶ 10(a),(b) (Los Angeles County expected to lose \$204 million); Affidavit of Jesus H. Garza (Exhibit J of Affidavits in Support) ¶ 5 (City of San Antonio anticipates losing \$21.3 million).

<sup>5</sup> E.g. Affidavit of Tom Udall (Exhibit U of Affidavits in Support) ¶ 8 (State of New Mexico funding shortfalls adversely affect the State's ability to provide police, water works, sewers, roads and schools); Affidavit of Susan S. Muranishi (Exhibit S of Affidavits in Support) ¶¶ 5, 6 (Alameda County programs such as the Job Training Partnership Program, Federal Community Development Block Grants, and the Childhood Lead Poisoning Prevention Program underfunded due to census undercounting).

<sup>6</sup> E.g., Bannister Aff., *supra*, ¶ 10 (Los Angeles County estimated to lose \$20 million per year in the first decade of the new century); Affidavit of Gary Graves (Exhibit Q of Affidavits



Census Bureau conducts the 2000 census employing a limited use of statistical sampling, the people residing within the boundaries of, or represented by, the Los Angeles-Appellees will continue to be unfairly deprived of federal and state resources.

**E. The Census 2000: A Solution to Differential Undercounting.**

After reviewing the reports of three separate, independent panels established by the National Academy of Sciences that studied over a six year period the undercounting problems of the 1990 census, the Census Bureau released a report to Congress regarding its plan for conducting the 2000 census. *See generally* J.A. at 34 (*Census 2000*). The plan calls for the limited use of statistical sampling in conjunction with traditional data-collecting techniques. Those statistical methods include the use of sampling that is "scientifically based; improves accuracy; eliminates the traditional undercount of children, renters and minorities; and saves money." *Id.* at 81. The Census Bureau's use of statistical sampling has been endorsed by the National Academy of Sciences, the Census Bureau's Advisory Committees, a "Blue Ribbon" panel of the American Statistical Association, the American Sociological Association, the General Accounting Office, and other scientific experts. *Id.* at 83-84.

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in Support) ¶ 10 (Santa Clara County projects a loss of \$57.3 million in the first decade); *see also* Affidavit of Rexford Olliff (Exhibit B of Affidavits in Support) ¶¶ 6-12 (because of undercounting, the City of Los Angeles will not receive its fair share of funds from various funding programs dependant on census data).

The Census Bureau is confident that its plan for the 2000 census will mitigate the net undercounting of the total population and differential undercounting, and result in "the most accurate and cost-effective census possible" in the year 2000. *Id.* at 40. It predicts that use of statistical methods in the 2000 census will decrease net undercounting inaccuracies to 0.1 percent nationally, 0.5 percent at the State level, and 0.6 percent at the Congressional district level, and reduce or eliminate the differential undercount, all while lowering costs. *Id.* at 44. Not a scintilla of contrary evidence was introduced in the district court.

Unfortunately, the Census Bureau's effort to improve the decennial census fell victim to partisan infighting.<sup>7</sup> A temporary compromise was struck when Congress passed, and President Clinton signed into law, the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111

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<sup>7</sup> Speaker of the House Newt Gingrich reportedly feared that an accurate census count may result in a shift of House seats from the Republicans to the Democrats. *See, e.g.,* John Mercurio, "Clinton May Use Recess to Appoint New Census Chief," *Roll Call* (Jan. 15, 1998), available in LEXIS, GENFED, ROLL CL. The Speaker has not always held these views. In 1991, Gingrich wrote to then-Commerce Secretary Robert Mosbacher to complain of "a serious negative impact" on Georgia because of undercounting there, noting that the undercount had cost his home state an additional Congressional seat. He asked that Georgia's census numbers be readjusted upward and voted to pass the 1991 bipartisan legislation authorizing the studies concerning the use of scientific sampling in the decennial census. A copy of the letter dated April 30, 1991, is attached as Exhibit B of Memorandum in Support of Motion of the City of Los Angeles, et al. to Intervene As Defendants.

Stat. 2440, 2480-87 (1997) ("1998 Appropriations Act"). Among other things, the 1998 Act provided that either house of Congress could bring a lawsuit blocking implementation of the Census Bureau's plan for the 2000 census. On February 20, 1998, Speaker of the House Newt Gingrich filed this lawsuit in the United States District Court for the District of Columbia, nominally on behalf of the House of Representatives, to prevent the use of statistical sampling in the 2000 census. The district court granted the Los Angeles-Appellees' motions to intervene as defendants, as well as similar motions by several other groups. The defendants brought various motions to dismiss, and the House moved for summary judgment. The district court ruled that use of statistical sampling for apportionment purposes is prohibited by 13 U.S.C. § 195, entered judgment on behalf of the House, and enjoined the Federal Government defendants from using statistical sampling for purposes of Congressional apportionment. This appeal followed.

### SUMMARY OF ARGUMENT

The census is too important to the functioning of our democracy, and too central to the financial condition of State and local governments, to be made a pawn in an unseemly effort to gain political advantage, or to fall victim to legal sophistry. Accordingly, this brief focuses on three key points:

- (1) The district court's backwards analysis of sections 141 and 195 of the Census Act, 13 U.S.C. §§ 1, *et seq.*, ignores their plain meaning. Read together, those sections plainly authorize the use of statistical sampling for apportionment purposes. But even if the Court decides those provisions are ambiguous, it

should defer to the Census Bureau's interpretation of the statute under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984).

- (2) The Census Clause of the Constitution does not prohibit the use of sampling for purposes of apportionment. Instead, it expressly delegates to Congress the authority to conduct the census "in such Manner as they by law shall direct." The Framers debated and decided the rule upon which the apportionment of the House of Representatives would be based -- *i.e.*, the number of all the free inhabitants, but only three-fifths of the slave population -- not the method of taking the census. It defies both logic and history to argue -- as the House did below -- that although the Framers decided to apportion Congressional representation among the States on the basis of their respective populations, they also intended to prohibit techniques that would ensure the most accurate population assessment.
- (3) Even if statistical sampling may not be used to adjust the census for apportionment purposes, the Census Act *requires* that it be used to adjust the census data for other purposes, such as the distribution of federal funds or redistricting. Thus, if this Court affirms the district court's judgment, the Secretary of Commerce must use statistical sampling to produce adjusted census results for all non-apportionment purposes.



## ARGUMENT

### I. Sections 141 and 195 of the Census Act Authorize the Secretary of Commerce to Use Statistical Sampling for the Purpose of Apportionment.

#### A. The Plain Text Permits Use of Statistical Sampling For Apportionment.

Giving the text its ordinary meaning and reading the Census Act as a whole, the import of sections 141(a) and 195 is plain: Congress delegated its "virtually unlimited discretion" over the conduct of the census to the Secretary of Commerce ("Secretary"), leaving it to the Secretary to decide whether to use statistical sampling in the decennial census for the purpose of apportionment. 13 U.S.C. §§ 141(a), 195; *see Wisconsin*, 517 U.S. at 19. For purposes other than apportionment, section 195 requires the Secretary to use sampling whenever -- as is the case here -- he considers it feasible.

#### 1. The Statutory Inquiry Is at an End Where Congress' Intent Is Expressed Plainly on the Face of the Statute.

The primary canon of statutory construction directs courts to glean meaning from the plain text. *See, e.g., Norfolk & W. Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991). An equally important rule is that a court must give effect to each word and provision of the statute at issue. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955). This requires a court to harmonize statutory provisions so as to give each full force and effect. *See, e.g., Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989). As shown below, the Court can discern the meaning of sections 141(a) and 195

by applying these most elementary rules of construction to their plain text. "If the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842.

#### 2. Section 141 of the Census Act Authorizes the Secretary To Use Statistical Sampling for Apportionment Purposes.

In section 141(a), Congress expressly provided that the Secretary shall take the decennial census of population "in such form and content as he may determine, including the use of sampling procedures." 13 U.S.C. § 141(a) (emphasis added). In *Wisconsin*, this Court held that, through section 141(a), Congress had delegated its "virtually unlimited discretion" to conduct the decennial census of population to the Secretary, 517 U.S. at 19, the same census that is to be used for apportionment purposes. *See* 13 U.S.C. § 141(b). Thus, the plain text of section 141 empowers the Secretary to employ sampling to determine the population for the purpose of apportionment of Congressional Representatives.

#### 3. Section 195 of the Census Act Does Not Apply to Apportionment.

In section 141(a), Congress authorized -- but did not require -- the Secretary to employ the use of sampling procedures in carrying out the decennial census. That section leaves to the Secretary's discretion whether to use sampling, since he is authorized to take the decennial census "in such form and content as he may determine." 13 U.S.C. § 141(a). That discretion -- but only as it relates to census functions *other than apportionment* -- is constrained by section 195, which provides:

*Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.*

13 U.S.C. § 195 (emphasis added). Thus, for purposes other than apportionment, the Secretary does *not* have the broad discretion afforded by § 141(a) to determine whether or not to use sampling. Rather, "if he considers it feasible" the Secretary "shall" use statistical sampling for non-apportionment purposes.

But section 195 does *not* similarly constrain the Secretary's discretion with respect to the use of sampling when determining the population for apportionment. In that area, the Secretary retains the broader discretion afforded by section 141(a). Plainly, section 195 does not prohibit the use of statistical sampling to apportion seats in the House; it simply does not apply to the subject.

## **B. The District Court Failed To Properly Construe the Plain Text of the Census Act.**

### **1. The District Court's Analysis Was Backwards.**

In interpreting sections 141 and 195, the district court inexplicably ignored the most fundamental tenets of statutory construction. Rather than begin its analysis with the text of the two sections, the district court started with the legislative history. It looked first to section 195 as it existed in 1957, as well as the legislative history surrounding the 1957 enactment of section 195. Jurisdictional Statement ("J.S.")

at 48a-50a (reprint of district court opinion in *United States House of Representatives v. United States Dep't of Commerce*, Civ. A. No. 98-0456 (D.D.C. Aug. 24, 1998) ("Opinion")). Thus, while accepted canons of construction required the lower court to turn first to the current text of the statutes, it started instead with an inquiry into the history of a statute long since amended. "As a method, this is just backwards, and however much we may be attracted by the result it produces in a particular case, we should in every case resist it." *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

The district court took this extra-textual odyssey back forty years in order to form a "background knowledge" it claimed is required to understand the plain text. *See* J.S. at 53a (Opinion). The court assumed, with virtually no analysis, that as originally enacted in 1957, section 195 prohibited the use of sampling for purposes of apportionment. Although the court acknowledged that section 195 was amended in 1976, it gave no serious consideration to the import of simultaneous amendments to section 141 authorizing the use of sampling for all purposes. Thus armed, and without regard to the context provided by other sections of the same act -- especially section 141(a) -- the district court next parsed section 195 using purportedly analogous hypotheticals about birthday cakes and wedding dresses. *See id.* at 51a-53a. Ignoring express authorization for the use of sampling for apportionment in section 141(a), the district court finished its analysis of the text of section 195 by proclaiming that "a prior understanding [*i.e.*, the 1957 version of section 195 and the "special" nature of apportionment] demands the conclusion that whether to use statistical



sampling is not to be left to the discretion of the Secretary of Commerce." *Id.* at 53a.

Having already concluded that section 195 "indisputably proscribes" the use of sampling for apportionment, the district court half-heartedly attempted to harmonize it with sections 141(a) and (b). *See id.* at 59a-62a. Again, it proceeded backwards. It should have looked at the various sections and attempted to construe them in harmony, rather than first construing section 195 in isolation. But, having already fixed on an erroneous interpretation of section 195, the court found it conflicted with section 141(a), a dilemma it resolved by improperly applying the rule that more specific statutes govern more general provisions. *Id.* at 61a-62a. Following this twisted path, the district court held that the plain text of section 195 bars use of statistical sampling in the decennial census for the purpose of apportionment of the House.

In an effort to bolster its flawed statutory analysis, the district court returned to the legislative history. Once again, its reasoning was deficient. The district court ignored that at the very same time that Congress amended section 195, it enacted section 141(a), expressly authorizing the use of sampling in the decennial census. Instead, it lamented that it could not find anything in the legislative history of section 195 to the effect that Congress intended to permit the use of sampling in connection with apportionment. *See id.* at 54a-59a. Evoking the imagery of *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980), the district court likened the situation to a watchdog that did not bark. *See J.S.* at 55a (Opinion). Colorful as the district court's allusions to

birthday cakes, wedding dresses, and barking dogs may be, they are no substitute for sound analysis.

## 2. Of Birthday Cakes and Wedding Dresses: The District Court's Improper Analysis of Sections 195 and 141.

Asserting that "an exception from a command to do 'X' more often than not represents a prohibition against doing 'X' with respect to the subject matters covered in the exception," *id.* at 52a, the district court turned to hypothetical analogies about birthday cakes and wedding dresses in an effort to support its conclusion that section 195 prohibits the use of statistical sampling for apportionment. But neither its assertion about the meaning of exceptions, nor its analogies, prove its point.

To its credit, the district court conceded that there are instances where an exemption from a command does not operate as a prohibition. *See id.* at 52a. The court acknowledged a few examples from the United States Code. *Id.* at 51a-52a. It could have listed many more. For example, suppose a mother tells her teenaged son: "Except for weekends, you must be home by 8:00 p.m." She is not *prohibiting* her son from getting home on Saturday night before 8:00 p.m. She is not addressing the weekend curfew at all. Her son can't tell from that statement alone what the rule is for Saturday night.

Similarly, although section 195 tells the Secretary he "shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling'" when determining the population for purposes other than apportionment -- *e.g.*, the distribution of federal funds to the States or redistricting

-- it does not tell him whether using sampling for apportionment purposes is permissible. Certainly, it does not *prohibit* it.

Where can the Secretary find the answer? In section 141(a), where Congress directs him to take the decennial census "in such form and content as he may determine, including the use of sampling procedures." 13 U.S.C. § 141(a).

If the district court had actually attempted to harmonize sections 195 and 141, it would have seen that its hypothetical analogies were incomplete. For example, the court hypothesized that someone gave the following directive: "Except for Mary, all children at the party shall be served cake." J.S. at 51a (Opinion). The court concluded that the person who issued the directive "would be quite surprised to learn that Mary had been served cake." *Id.* at 52a. Similarly, the district court considered a hypothetical directive by a granddaughter: "except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners." *Id.* at 53a. According to the court, the granddaughter must have intended to prohibit taking her grandmother's wedding dress to the cleaners. *Id.* It reached this conclusion "because of our background knowledge concerning wedding dresses: We know that they are extraordinarily fragile and of deep sentimental value to family members. We therefore would not expect that the decision to take a [wedding] dress to the cleaners would be purely discretionary." *Id.* The court then likened the apportionment function to the wedding dress. *Id.* Because apportionment is "special," the court could not believe that whether to use statistical sampling for

apportionment could be left to the discretion of the Secretary "absent a more direct congressional pronouncement." *Id.*

Of course there is a "direct congressional pronouncement:" section 141(a). The lower court just neglected to consider it in connection with its hypotheticals. If it had, the complete hypotheticals would read:

*Birthday Cake:*

"You have discretion to give Mary some cake."  
(Section 141(a))

Except for Mary, all children at the party shall be served cake. (Section 195)

*Wedding Dress:*

"You have discretion to take my grandmother's wedding dress to the cleaners." (Section 141(a))

"Except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners."  
(Section 195)

Thus completed, the district court's expectation that the person who issued the directive "would be quite surprised to learn that Mary had been served cake" becomes baseless. Similarly, when the wedding dress analogy is complete, the portion analogous to section 195 *cannot* reasonably be interpreted to prohibit cleaning the wedding dress. The context -- the portion of the hypothetical analogous to section 141(a) -- makes this clear no matter how "special" the



wedding dress may be. The wedding dress *may* be cleaned, while the other clothes *must* be cleaned.<sup>8</sup>

The incomplete nature of the district court's hypotheticals reflects its refusal to harmonize sections 141(a) and 195. Instead of using the plain text to divine Congressional intent, the district court resorted to speculation based on its view of the "special" nature of apportionment. *See id.* at 53a. By straying outside the four corners of the statute, the court missed the "direct congressional pronouncement" afforded by section 141(a). *See id.*

Moreover, by not confining its review to the text, and by refusing to harmonize sections 141(a) and 195, the district court manufactured a conflict between those sections. It purported to resolve this conflict by invoking the rule that a more specific statute controls over a more general one. *Id.* at 61a. But it botched that analysis as well. Section 195 is *not* "specific" with respect to the use of sampling for apportionment purposes. As noted above, it simply does not apply to the subject. Rather, that subject is governed only by section 141(a).<sup>9</sup>

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<sup>8</sup> Even the teenager's conundrum over his curfew can be resolved in this way, provided his mother addresses the subject: "You have discretion to stay out as late as you like on weekends." (Section 141(a))  
"Except for weekends, you must be home by 8:00 p.m." (Section 195)

<sup>9</sup> In a final effort to resolve the false conflict between sections 141(a) and 195, the district court resorted to looking at their respective titles. J.S. at 61a (Opinion). This, too, was improper and unnecessary. *See Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956, 141 L.Ed.2d 215 (1998) ("The

When sections 141 and 195 are harmonized and given full effect, their meaning is clear: the Secretary may, in his discretion, use sampling for apportionment of the House. He must use sampling for other purposes, if he considers it feasible. Prior to the district court's judgment, nearly every federal court to consider the issue had agreed. *See City of New York v. United States Dep't of Commerce*, 34 F.3d 1114, 1124-25 (2d Cir. 1994), *rev'd on other grounds*, 517 U.S. 1 (1996); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Carey v. Klutznick*, 508 F. Supp. 404, 414-15 (S.D.N.Y. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1334-35 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981). *But see Orr v. Baldrige*, No. IP 81-604-C (S.D. Ind. July 1, 1985).

### C. The Legislative History Confirms that Congress Authorized the Use of Sampling for Apportionment Purposes.

Even if resort to the legislative history was necessary -- and in light of the plain language of sections 141(a) and 195 it was not -- it cannot support the district court's conclusion.

#### 1. The Legislative History Supports the Census Bureau's Interpretation of Section 195.

The district court concluded that the pre-1976 version of section 195 prohibited the use of sampling for apportionment purposes. It therefore expected to hear some "barking dogs" in the legislative history if the 1976 amendments removed

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title of a statute . . . cannot limit the plain meaning of the text. For interpretative purposes, [it is] of use only when [it] shed[s] light on some ambiguous word or phrase.") (internal quotation marks omitted).

that prohibition. But the district court must have covered its ears. In 1976, Congress rewrote *both* sections 141 and 195. Pub. L. No. 94-521, 90 Stat. 2459, 2461, 2464 (1976). The 1976 legislation changed section 195 to its present form, and added -- for the first time -- section 141(a). As noted above, the new section 141(a) granted the Secretary discretion to use sampling in the decennial census, the basis for Congressional reapportionment. At the same time, section 195 was amended to eliminate any possible prohibition on the use of sampling for apportionment purposes, and to require its use, if feasible, for all other purposes.

These changes are reflected best in the words of the statute, but are also shown in the relevant reports. For example, the Senate Report states that section 141(a) was amended to encourage sampling in connection with the decennial census.<sup>10</sup> The House Report and Conference Report echo this thought.<sup>11</sup>

In contrast, there are no equally clear pronouncements in the legislative history that would support the district court's contrary conclusion. Rather, the legislative history relating to section 195 reaffirms the Congressional intent to increase the use of sampling "wherever possible."<sup>12</sup>

<sup>10</sup> See S. Rep. No. 94-1256, at 4 (1976) ("New language is added at the end of the subsection to encourage the use of sampling and surveys in the taking of the decennial census.").

<sup>11</sup> See H.R. Rep. No. 94-944, at 2 (1976) (House Report); H.R. Rep. No. 94-1719, at 11 (1976) (Conference Report).

<sup>12</sup> H.R. Rep. No. 94-944, at 6 (clarifying Congressional intent that, "wherever possible, sampling shall be used"); see S.

## 2. Of Barking Dogs and Shifting Burdens: The District Court's Interpretation Repeals the 1976 Amendments to Section 195.

The district court felt it needed a more dramatic statement of Congressional intent if, as the court characterized it, Congress sought to "work a historic change in the manner in which the Secretary is permitted to conduct the apportionment enumeration." See J.S. at 54a (Opinion). It looked for, and missed (again), a "definitive signal from Congress" that the Secretary could depart from "past practices." *Id.* at 55a. Indeed, the court found the alleged silence of the Congressional "watchdogs" determinative of the fact that Congress could not have intended to give discretion to the Secretary to determine whether to use statistical sampling for apportionment purposes. *Id.* at 55a-57a. Once again, the district court's analysis suffered from profound flaws.

First, the district court overstates the "historic change" worked by the 1976 amendments. The history of the decennial census is one of innovation, and an ever increasing embrace of statistical methods.<sup>13</sup>

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Rep. No. 94-1256, at 6; see also H.R. Rep. No. 94-1719, at 13 ("The section as amended strengthens congressional intent that, whenever possible, sampling shall be used.").

<sup>13</sup> See generally J.A. at 347-352 (Anderson Decl. ¶¶ 10-17). Over the course of the century, the Census Bureau has carefully examined with growing confidence the science of statistics. The 1900 census law authorized the appointment of an assistant director who was an experienced statistician, as well as five chief statisticians. *Id.* at 347, ¶ 10. In the 1950's, the Census Bureau used statistics to understand the reasons for the undercount, and it was during this time that the post-enumeration survey ("PES") was



Second, the district court missed the "definitive signal from Congress" regarding this express change in law. That signal was section 141(a), amended at the same time as section 195. Congress "barked" through the language of the statute; that should have been sufficient for the district court.

[T]he notion [is wrong] that Congress cannot be credited with having achieved anything of major importance by simply saying it, in ordinary language, in the text of a statute, 'without comment' in the legislative history. As the Court colorfully puts it, if the dog of legislative history has not barked nothing of great significance can have transpired. Apart from the questionable wisdom of assuming dogs will bark when something important is happening, we have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past.

*Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (citations omitted) (Scalia, J., dissenting).

Finally, the district court impermissibly shifted the burden of persuasion to the defendants. J.S. at 59a (Opinion).<sup>14</sup>

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first developed. *Id.* at 347-48, ¶¶ 11, 12. Starting with the 1970 census, and in every census since, the Census Bureau used a statistical method called imputation to make corrections to the census figures. J.A. at 81-82 (*Census 2000*).

<sup>14</sup> The district court contended that the defendants did not carry their "*Bock Laundry* burden" of showing the 1976 amendments were intended to change settled law J. *Id.* But the presumption established in *Green v. Bock Laundry Mach. Co.*, 490

#### **D. The Census Bureau's Reasonable Interpretation of Sections 141 and 195 is Entitled to Deference Under *Chevron*.**

If there is any doubt remaining on the statutory issue, it is easily resolved under the rule of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1986). Under *Chevron*, a court must defer to an agency's reasonable interpretation of a statute. *See id.* at 844. Assuming the Court finds section 195 ambiguous, the *Chevron* deference standard resolves the dispute, and the district court's judgment must be reversed.

##### **1. The Court Should Apply the *Chevron* Deference Standard to the Census Bureau's Interpretation of Section 195.**

Under *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. For an agency's interpretation to be reasonable, the court need not conclude that the agency's construction is the only one permissible, nor that the agency's interpretation is the one the court would have reached. *Id.* at 844 n.11 (citing *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39

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U.S. 504 (1989), only applies in cases where an ambiguity in the text of a Federal Rule of Evidence purportedly changes a well-settled common law evidentiary rule, and therefore is inapposite. *See Tome v. United States*, 513 U.S. 150, 163 (1995); *Williamson v. United States*, 512 U.S. 594, 615 (1994) (Kennedy, J., concurring); *Bock Laundry Mach. Co.*, 490 U.S. at 521. As plaintiff and the party seeking summary judgment, the House had the burden of persuasion. It failed to carry it.

(1981)). If the agency's interpretation of the statute is reasonable, the court is not to impose its own construction of the statute. *Id.* at 843.

This Court should defer to the Census Bureau's interpretation. As noted above, Congress has delegated to the Secretary of Commerce the responsibility to take the decennial census. 13 U.S.C. § 141(a); *Wisconsin*, 517 U.S. at 5. In performing his duties under the Census Act, the Secretary is assisted by the Census Bureau (which is an agency within, and under the jurisdiction of, the Commerce Department) and the Census Bureau's head, the Director of the Census. 13 U.S.C. §§ 2, 21; *Wisconsin*, 517 U.S. at 5. As the agencies responsible for administering the Census Act, the Commerce Department and Census Bureau reasonably have concluded that section 141(a) authorizes -- and section 195 does not prohibit -- the use of sampling to correct the decennial census of population. *See* J.A. at 133-38 (*Census 2000*).

## 2. The District Court's Summary Dismissal of *Chevron* Was Another Error.

The court below relegated its discussion of *Chevron*'s deference standard to a footnote. J.S. at 46a n.11 (Opinion). It gave three purported reasons why deference to the Census Bureau's interpretation was not appropriate: (1) plain text and legislative history left no doubt as to the Congressional intent underlying section 195; (2) because the Secretary has held different positions on section 195, less deference should be afforded his current opinion; and (3) the Secretary has not amply justified his change of position with a reasoned analysis. *Id.* None is valid.

First, as discussed above, neither the plain text nor the legislative history support the construction reached by the district court. Even if the district court disagreed with the Census Bureau's construction, it did not, nor could not, find that the Census Bureau's interpretation was unreasonable. Assuming the district court's construction is plausible -- which it is not -- and the Census Bureau's is reasonable -- which it is -- at best the court had established an ambiguity, in which case the *Chevron* deference standard is the tie-breaker. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[W]here the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction.").

Second, the district court's view that the Secretary's interpretation should be given less deference because the Secretary has taken another position in the past rings hollow because it gave the Secretary's interpretation no deference at all. More important, *Chevron* and its progeny have repudiated the significance of this holdover from earlier cases.<sup>15</sup> If a change of position is relevant at all, it is merely one factor to consider. *See Good Samaritan Hosp.*, 508 U.S. at 417. The weight this factor is given depends on the circumstance. *Id.* Here, it is entitled to none. The Secretary's

<sup>15</sup> "This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question." *Rust v. Sullivan*, 500 U.S. 173, 186 (1991). An agency need not "establish rules of conduct to last forever," but rather "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" *Id.* (citing *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (citations omitted)).



change of position was not only justified, but required by the current state of the law. See J.A. at 133-38 (*Census 2000*) (discussing the case law that developed throughout the 1980's interpreting section 195 and the broad discretion recognized in the *Wisconsin* decision.) "The Secretary is not estopped from changing a view [he] believes to have been grounded upon a mistaken legal interpretation." *Good Samaritan Hosp.*, 508 U.S. at 417.

Finally, the district court's third reason -- that the Secretary failed to "amply justify" his change of position with a "reasoned analysis" -- is makeweight. As discussed above, changes in the law amply justified the shift in the Secretary's legal analysis. As for the affirmative decision to use scientific sampling, that too represents a carefully reasoned decision to adapt Census Bureau policies to improved statistical methods. In 1991, the Secretary declined to implement an adjustment of the 1990 census primarily because he was not yet comfortable with the statistical approach of the time.<sup>16</sup> The Secretary explicitly left open the possibility of using sampling in the 2000 census after

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<sup>16</sup> Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population, 56 Fed. Reg. 33,582, 33,583 (July 15, 1991) (statement of Robert A. Mosbacher, Secretary of Commerce) ("There was a diversity of opinion among my advisors. The Special Advisory Panel split evenly as to whether there was convincing evidence that the adjusted counts were more accurate....Ultimately, I was compelled to conclude that we cannot proceed on unstable ground in such an important matter of public policy.").

conducting further research.<sup>17</sup> Six years later, in their report to Congress, the Commerce Department and Census Bureau explained how after long-term, detailed study, much of it Congressionally-mandated, they "determined that Census 2000 would be rendered more accurate and more cost-effective by the introduction of limited sampling in addition to traditional methods of enumeration." J.A. at 138 (*Census 2000 Report*). This analysis is ample.<sup>18</sup>

### 3. The District Court's Interpretation of Section 195 Results in Legislation by Judicial Fiat.

There is yet another reason for deferring to the Census Bureau's interpretation. In 1997, the House of Representatives passed a bill to amend section 141(a) by expressly prohibiting sampling in the census data used to apportion the House, but it was vetoed.<sup>19</sup> The House should not be

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<sup>17</sup> *Id.* at 33,584.

<sup>18</sup> The district court also attempted to bolster its erroneous interpretation of section 195 by invoking the doctrine that statutes should be construed to avoid "serious constitutional questions." J.S. at 49a (Opinion). As shown below, this case raises no "serious" constitutional issues. And in any event, this Court has cautioned: "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a Constitutional question," especially where "nothing in the legislative history remotely suggests a legislative intent contrary to Congress' chosen words." *United States v. Locke*, 471 U.S. 84, 96 (1985); see also *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1228, 140 L. Ed. 2d 350 (1998) (doctrine inapplicable where majority has no grave doubts as to constitutionality).

<sup>19</sup> Supplemental Appropriations and Rescissions Act, H.R. 1469, 105th Cong., 1st Sess., tit. VIII, § (b)(1) (1997).

permitted to in effect enact the same legislation through resort to the courts.

For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

*Furman v. Georgia*, 408 U.S. 238, 468 (1972) (Rehnquist, J., dissenting). "There are no considerations of policy or practical need which should lead us, by judicial fiat, to do that which Congress, after full study of the subject, has failed to do." *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 106 (1946) (Stone, J., dissenting).

## II. The Constitution Does Not Prohibit the Use of Sampling in the Decennial Census.

The Constitution requires only that a census be conducted every ten years, leaving it to Congress to decide how the census will be conducted. The original text of article I, section 2 (before its amendment by section 2 of the Fourteenth Amendment) read as follows:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, *according to their respective Numbers*, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The *actual Enumeration* shall be made within three Years after the first Meet-

ing of the Congress of the United States, and within every subsequent Term of ten Years, *in such Manner as they shall by Law direct*. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

U.S. Const., art. I, § 2, cl. 3 (emphasis added).

In the district court, the House contended that the phrase "actual Enumeration" requires a head-by-head count of the populace, and precludes the use of statistical sampling in the census.<sup>20</sup> Relying on various snippets of the debates at the Constitutional Convention, taken entirely out of context, the

<sup>20</sup> Although the lower court did not reach this constitutional issue, this Court should not hesitate to resolve it now. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 823-24 (1968) (this Court will decide an issue not resolved below where it has persuasive prudential reasons for doing so, and further proceedings below would serve no useful purpose). As detailed in the Joint Motion to Expedite Consideration of Jurisdictional Statement, the Census Bureau needs a prompt resolution of the issue if it is to conduct the most accurate census possible. Congress has recognized the need for prompt resolution of the issue. See *1998 Appropriations Act*, 111 Stat. 2482, § 209(e)(2). Because it is a pure legal issue, no purpose would be served by remanding for consideration by the district court.



House argued that the Framers insisted on a "headcount" as a way to avoid political manipulation of the census. But contrary to the House's arguments, there is nothing in the text of the Apportionment or Census Clauses, or in the debates that resulted in the formulation of their text, that proscribes the use of statistical sampling in the decennial census or prescribes a particular method of collecting census data. Rather, the Framers expressly provided that the census was to be conducted "*in such Manner as [Congress] shall by law direct.*"

**A. "Enumeration" Simply Means "Census" — the Ascertaining of the Number of People.**

The best clues to the meaning of "Enumeration" as used in the Census Clause come not from any dictionary, but from the Constitution itself. Article I, section 2 tells us that representatives are to be apportioned among the States "*according to their respective Numbers*" of inhabitants.<sup>21</sup> In other words, "in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants." *Wesberry v. Sanders*, 376 U.S. 1, 13-14 (1964). Article I, Section 2 goes on to say that "*The actual Enumeration*" — i.e., the actual ascertainment of the number of inhabitants — is to be performed within three years after the first meeting of Congress and, thereafter, every "ten years." "[U]ntil such enumeration" — i.e., the "actual Enumeration" — is made, each State received an initial allocation of representatives. Congress was given "virtually unlimited discretion" to conduct the

<sup>21</sup> The same language is used in Section 2 of the 14th Amendment.

enumeration "*in such Manner as they shall by Law direct.*" *Wisconsin*, 517 U.S. at 19.

The word "Enumeration" appears again in the Constitution in article I, section 9, clause 4: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." Before this clause was revised during the final days of the Convention, it read, "No capitation tax shall be laid, unless in proportion to *the census herein before directed to be taken.*" See J.A. at 397 (Rakove Decl. ¶ 17); 2 *The Records of the Federal Convention of 1787* (hereinafter "*Records*"), at 596 (emphasis added) (Max Farrand, ed. 1911).

Two revisions were subsequently made to this clause at the close of the Convention. First, the phrase "or other direct tax" was inserted after "capitation." Second, and more important, the words "or enumeration" were inserted after "census." In the exact language of Madison's notes, "On motion of Col: [George] Mason, 'or enumeration' inserted after, *as explanatory of Census.*"<sup>22</sup> J.A. at 397-98 (Rakove Decl. ¶ 17); 2 *Records* at 596, 618 (Mason, September 14) (emphasis added). In other words, "census" and "enumeration" were used synonymously.<sup>23</sup>

<sup>22</sup> For further documentation, see *Supplement to Max Farrand's The Records of the Federal Convention of 1787*, at 269 (James H. Hutson ed., 1987).

<sup>23</sup> Even the House acknowledged that the use of the terms "census" and "enumeration" in Article I, § 9, cl. 4 "suggests [that] 'census' was synonymous with 'enumeration of inhabitants.'" *Memorandum for Plaintiff United States House of Representatives in Support of Its Motion for Summary Judgment* at 48 n.35. In

Dictionary definitions also support the conclusion that "Enumeration" simply means a census, or the ascertaining of the number of inhabitants. According to the *Oxford English Dictionary*, a comprehensive source that traces the meaning of words over time, since at least 1577, one meaning of "enumeration" -- indeed, the first meaning given -- is "the action of ascertaining the number of something; esp. the taking a census of population; a census." 5 *Oxford English Dictionary* 311 (1989).<sup>24</sup> The same dictionary defines census as "[a]n official enumeration of the population of a country or district, with various statistics relating to them." 2 *Oxford English Dictionary* 1031 (1989). Thus, "census" is defined as an "enumeration," and "enumeration" is defined as the ascertaining of the number of something; if that "something" is people, then "enumeration" means "census." Nothing in the definitions of "census" or "enumeration" dictate a particular method of ascertaining the number, and thus cannot prohibit the use of sampling.

That "Enumeration" means "census," and nothing more, is also supported by the fact that the Framers used the term "census" throughout the debates on the rule of apportionment. For example, Edmund Randolph proposed "that in order to ascertain the alterations in the population & wealth

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that memorandum, the House correctly cites *A Compendious Dictionary of the English Language* 46, edited by Noah Webster in 1806, as defining census to mean "an enumeration of inhabitants." *Id.*

<sup>24</sup> See also Samuel Johnson, 1 *A Dictionary of the English Language* 319 (1756); Thomas Sheridan, 1 *A Complete Dictionary of the English Language* (1790) (unpaginated) (both defining "enumeration" as the "act of numbering or counting over").

of the several States the Legislature should be required to cause a *census*, and estimate to be taken within one year after its first meeting; and every \_\_ years thereafter -- and that the Legislre. arrange the Representation accordingly." 1 *Records* at 570-71 (Randolph, July 10) (emphasis added, blank in original). Similarly, Gouverneur Morris rejected this proposal for fixing a period for "taking a *census*." *Id.* at 571 (Morris, July 10) (emphasis added). It was only after the debates were completed, when the Committee of Style was reworking the draft of the Constitution, that the phrase "actual Enumeration" was substituted, without comment. J.A. at 391, 395-97 (Rakove Decl. ¶¶ 10, 15-16); 2 *Records* at 571, 590-91.

More important, the Framers continued to use the word "census" when referring to the phrase "actual Enumeration" even after the Constitutional Convention adjourned. For example, the word "census" is substituted for "actual Enumeration" in *The Federalist*. In a discussion of taxation and article I, section 9, in *Federalist No. 36*, Alexander Hamilton refers to the "actual Enumeration" required in section 2 as "[a]n actual census or enumeration."<sup>25</sup> In *Federalist 54*, James Madison wrote that "the accuracy of the *census* to be obtained by the Congress" should be greatly

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<sup>25</sup> "Let it be recollected that the proportion of these taxes is not to be left to the discretion of the national legislature, but is to be determined by the numbers of each State, as described in the second section of the first article. *An actual census or enumeration* of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression." *The Federalist No. 36*, at 220 (Hamilton) (Clinton Rossiter ed., 1961).



promoted by the linking of both representation and taxation to the census numbers. *The Federalist* No. 54, at 340 (Madison) (Clinton Rossiter ed., 1961) (emphasis added). If "actual Enumeration" required a head-by-head count for accuracy, Madison would have said as much. Instead, Madison argued that accuracy would be assured because any temptation on the part of a State to overstate its population would be counterbalanced by a desire to avoid taxes based on population. *Id.*; see J.A. at 398-99 (Rakove Decl. ¶ 19). Finally, in *Federalist* 58, James Madison described the "Enumeration" set forth in article I, section 2 as follows: "within every successive term of ten years a *census of inhabitants* is to be repeated." *The Federalist* No. 58, at 356 (Madison) (Clinton Rossiter ed., 1961).

**B. The Word "Actual" in "Actual Enumeration" Was Used to Distinguish the Census From the "Conjectural Ratio" Used to Allocate House Seats Before the First Census.**

According to Thomas Sheridan's 18th century dictionary, the word "actual" meant "really in act, not merely potential; in act, not purely in speculation." Thomas Sheridan, *A General Dictionary of the English Language* (1784). It is also clear from the context, and the use of the phrase "actual census" during the debates, that the phrase "actual Enumeration" was used to differentiate the census that was to be conducted "within three years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years," from the "conjectural rule" that apportioned Representatives among the States for the initial period before the first census. See U.S. Const. art. I, § 2.

That initial allocation of Representatives to the first House of Representatives was proposed by a committee and consisted of a "mere conjecture" based on rough estimates of each state's population and wealth. 1 *Records* at 579 (Randolph, July 11). Mr. Sherman "wished to know on what principles or calculations the Report was founded. It did not appear to correspond with any rule of numbers." *Id.* at 559 (Sherman, July 9). Mr. Gorham, one of the committee members, responded that "[s]ome provision of this sort was necessary in the outset. The number of blacks and whites with some regard to supposed wealth was the general guide." *Id.* (Gorham, July 9). Gouverneur Morris later added that "[t]he Report is little more than a guess." *Id.* at 560 (Morris, July 9). The committee revised the initial apportionment of seats and increased the number from 56 to 65. *Id.* at 563 (July 10).

The "conjectural ratio," *id.* at 578 (Mason, July 11), used for the initial apportionment was, in the context of the debates at the Convention, juxtaposed to an "actual census." For example, Madison records Mason's dissatisfaction with the pre-census apportionment as follows: "Mr. Mason did not know that Virginia would be a loser by the proposed regulations but had some scruple as to the justice of it. He doubted much whether the conjectural rule which was to precede the census, would be as just, as it would be rendered by an *actual census*." *Id.* at 602 (Mason, July 13) (emphasis added); see also J.A. at 394 (Rakove Decl. ¶ 13). Elsworth also noted that "the rule will be unjust until an *actual*

census shall be made." 1 *Records* at 602 (Elseworth, July 31) (emphasis added).<sup>26</sup>

Thus, "actual Enumeration" means simply an "actual" or "real" census of the people, as opposed to the initial "conjectural ratio" assigned for the pre-census period. This interpretation of "actual Enumeration" is consistent with the plain meaning of the sentence, and constitutional clause, that contains the phrase. The subject of the sentence -- "the what" -- is the "actual Enumeration" as opposed to the initial "conjectural ratio" set forth at the end of the clause; the "when" is within three years of the first meeting of Congress and then every subsequent ten years, and the "how" is "in such manner as they [Congress] shall by Law direct."

**C. The "Permanent & Precise Standard" That The Framers Of The Constitution Decided Upon Was The Rule Upon Which The Apportionment Of The House Of Representatives Would Be Based And Not The Method Of Conducting The Census.**

Although the House argued otherwise before the Court below, there was no debate at the Constitutional Convention over what method should be used to conduct the census for the purposes of reapportionment. The House's contention -- that the "permanent & precise standard" (George Mason's phrase) sought by some of the delegates at the Convention was a head-by-head count -- is specious and completely devoid of any historical support. It amounts to "junk history," and was thoroughly debunked in the lower court by the

<sup>26</sup> A similar comparison was made by Wilson Nicholas at the Virginia Ratifying Convention of 1788. 2 *The Founders' Constitution* 135 (1987).

eminent Pulitzer Prize-winning historian, Professor Jack N. Rakove. J.A. at 388 (Rakove Decl. ¶ 6).<sup>27</sup> The "permanent & precise standard" referred to by Mason was a rule of apportionment, and reapportionment: (1) based on the "number of inhabitants," and (2) constitutionally required on a periodic basis. 1 *Records* at 578 (Mason, July 11). That "standard" had absolutely nothing to do with any particular mode of conducting the census. That was left for Congress to decide. As explained by Professor Rakove:

the "*permanent & precise standard*" that delegates such as George Mason (quoted here) sought was to be determined by establishing a constitutional rule of reapportionment itself, not by specifying a mode of collecting data. What was at issue throughout this controversy, and what the delegates were explicitly addressing, were fundamental principles of representation itself. Was it legitimate or not to count slaves for purposes of representation, even though they could never be regarded as citizens in any sense of the term? Could the Union itself last if equitable rules for reapportionment were not explicitly incorporated in the text of the Constitution, to assure Americans that they

<sup>27</sup> Rakove is the Coe Professor of History and American Studies at Stanford University, and the country's leading authority on the original intent of the Framers, as revealed by primary sources documenting the politics and ideas that lead to the making of the Constitution. His Pulitzer Prize-winning book, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) ("*Original Meanings*"), examines the history and adoption of the Constitution, and is the definitive text on that subject.



would not sacrifice or dilute their political rights by migrating westward? If representation was to be based on both persons and property -- as the link to direct taxation and the inclusion of slaves suggested -- was not a simple population count the most accurate and convenient index of wealth? *These were the true questions that the delegates addressed in early July 1787 -- not the secondary matter of exactly how census data was to be compiled. That subject was in fact never debated per se; it was discussed only within the context of asking whether a population count provided the most convenient method of estimating wealth.*

J.A. at 386-87 (Rakove Decl. ¶ 5) (emphasis added).

James Madison's day-to-day notes of the debate demonstrate that the delegates' goal was to determine a substantive rule of reapportionment; they were wholly unconcerned with the mode of collecting census data. *Id.* at 391-92 (¶ 10). The initial proposal for the rule of apportionment was based on numbers of inhabitants alone. 1 *Records* at 532-33 (Mason, July 5). Gouverneur Morris had two objections to this proposed rule. First, he thought that because property was the "main object of Society" it should also be included as part of the measure of apportionment. *Id.* at 533 (Morris, July 5). Second, he felt strongly that the number of representatives from the Atlantic states should be "irrevocably fixed" so that these states would not later be outvoted by the new Western states. *Id.* at 534.

After Morris offered his proposal, and following some debate, the Convention appointed a new committee to

address the issue of apportionment. *Id.* at 540-42 (July 6). In a report issued on July 9, 1787, the committee proposed an initial apportionment for the first legislature of 56 seats divided among the states, and for subsequent apportionments "that the Legislature be authorized from time to time to augment the number of representatives" based on the principles of wealth and number of inhabitants. *Id.* at 559 (Morris, July 9).

The Framers rejected wealth alone as a basis for apportionment, in part because wealth would be difficult to measure -- it was "too indefinite and impracticable" to be a viable rule. *Id.* at 582 (Mason, July 11), 603 (Randolph, July 13). But wealth was never rejected as a factor to be considered in apportioning representation. The delegates became committed to giving the slaveholding states some representational credit for "their peculiar form of wealth in human beings," and thus "adopted the fiction that population, although not a perfect way of estimating wealth, was the most convenient and accurate means of doing so avail-

able."<sup>28</sup> J.A. at 393-94 (Rakove Decl. ¶ 12); *see also* 1 *Records* at 587 (Ghorum, July 11), 605 (Wilson, July 13).

Nonetheless, the Southern delegates were understandably wary of giving the almost certain to be Northern-dominated first Congress the discretion to decide whether or when to reapportion. *See, e.g.*, 1 *Records* at 592 (Pinkney, July 12). Thus, Edmund Randolph proposed on July 10, "that in order to ascertain the alterations in the population and wealth of the several states the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every \_\_\_\_ years thereafter -- and that the Legislature arrange the Representation accordingly." *Id.* at 570-71 (Randolph, July 10) (the blank is in the original).

In response, Gouverneur Morris expressed concern that constitutionally requiring Congress to take a periodic census would "fetter" the Legislature too much. *Id.* at 571 (Morris, July 10). He "candidly urged the Convention to coalesce in denying the future Western interior states the prospect of gaining control of the national legislature" by leaving it to

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<sup>28</sup> In addition, the Southern delegates believed that their States should receive additional House Seats for the contribution slavery made to the national welfare, and that the Constitution should explicitly provide for a measure of slaves. *Original Meanings* at 72-75. The North's accommodation of the South's demand resulted in the ignominious "three-fifths rule:" all free persons (other than most Native Americans) were counted as a "whole" person, but slaves only as three-fifths of a person. The three-fifths compromise reflected the view that slaves were human property, and enabled the slave-holding states to obtain the additional seats in the House they believed they both deserved and needed as security against the North. The Northern delegates viewed this "accommodation with slavery as the price of union." *Id.* at 73.

the Congress -- which would be dominated by the Northern states -- to determine whether or when to conduct a census for reapportionment. J.A. at 392-93 (Rakove Decl. ¶ 11); 1 *Records* at 571, 581-82, 583-84 (Morris, July 10, 11). Morris recognized that it was possible, though argued that it was not probable, that if "left at liberty" the Legislature would "never readjust the Representation." 1 *Records* at 571 (Morris, July 10).

Morris' position alarmed Southern delegates such as George Mason, Edmund Randolph, and James Madison. Mason responded that he did not object to "the conjectural ratio" that would prevail at the outset, *i.e.*, the number of representatives assigned to each State by the Committee for the initial House. However, he considered a "Revision from time to time according to some permanent & precise standard" to be essential to fair representation. *Id.* at 578 (Mason, July 11). He argued that according to the present population of America, the North "had a right to preponderate," but that the North should not continue to dominate the House when it no longer had a basis to do so. *Id.* Thus, Mason advocated that a "principle" must be "inserted in the Constitution" that would permanently ensure fair representation for all in the future -- this was a constitutionally mandated reapportionment based on a periodic census.

Mason also recognized the need for precision. He favored apportionment based on the relative wealth of the States, but like other delegates recognized that wealth was difficult to measure. So Mason accepted population as a proxy for wealth. He was, therefore, willing to accede to Randolph's proposal to base apportionment on population, urging "that numbers of inhabitants; though not always a



precise standard of wealth, was sufficiently so for every substantial purpose." *Id.* at 579.

Thus, the "permanent & precise standard" urged by Mason — and ultimately adopted by the delegates — was a constitutionally fixed reapportionment based on a periodic census of inhabitants. It is "permanent" in that the Constitution requires reapportionment every ten years. It is "precise" in that reapportionment is based on the "number of inhabitants" of each State, rather than some indefinite measure of wealth. Mason said nothing about the method by which the census should be conducted. There was absolutely no discussion at the Constitutional Convention about a headcount or any other possible mode of census taking. J.A. at 386-87 (Rakove Decl. ¶ 5).

#### **D. An Accurate Census Serves the Constitutional Objective of Equal Representation.**

Equal representation — one person, one vote — is the polestar of article I, section 2 of the Constitution. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). In discussing intrastate redistricting plans, the Court has recognized that adopting a standard based on data other than "population equality, using the best census data available, would subtly erode the Constitution's ideal of equal representation." *Karcher v. Daggett*, 462 U.S. 725, 731 (1983) (emphasis added) (citations omitted). Undoubtedly, an accurate census serves this fundamental constitutional purpose. Even though the Constitution grants Congress "virtually unlimited discretion in conducting the decennial" census, that broad grant is delimited by "keeping in mind the constitutional purpose of the census," i.e., *equal representation*. See *Wisconsin*, 517 U.S. at 19-20. It is absurd,

therefore, to suggest that the Framers would hamstring Congress with inaccurate physical headcounts when other more accurate and reliable methods of ascertaining the population are available. That absurd result follows, however, if — as the House contends — "actual Enumeration" requires a physical headcount.

While the Constitution does not require a certain level of accuracy be achieved in the census, it does not prohibit accuracy from being sought. Previously, this Court has refrained from making judgment calls regarding the magnitude of accuracy in final census figures. See *Wisconsin*, 517 U.S. at 18 (refusing to choose between "numerical accuracy or distributive accuracy," or ". . . gross accuracy to some particular measure of accuracy"). Indeed, this Court found that "the Constitution itself provides no real instruction on this point," and "[t]he polestar of equal representation does not provide sufficient guidance to allow us to discern a *single constitutionally permissible course*." *Id.* (emphasis added). The text provides no guidance and no "single constitutionally permissible course" because the Framers intended to give Congress "virtually unlimited discretion" to determine the method used to collect census data. *Id.* at 19. To believe otherwise would senselessly impute to the Framers an intent to place form over substance, headcounts over accuracy.

Thomas Jefferson appreciated that each generation had the ability, if not the duty, to increase the collective knowledge of this Nation, and correct the mistakes of the past:

When I contemplate the immense advances in sciences and discoveries in the arts which have been made within the period of my life, I look forward

with confidence to equal advances by the present generation, and have no doubt they will consequently be as much wiser than we have been as we than our fathers were, and they than the burners of witches.<sup>29</sup>

To find that the Census Clause restricts the conduct of the decennial census to physical headcounts when -- after years of careful and deliberate study -- the Secretary has determined that statistical sampling in conjunction with traditional methods of data collection will produce a more accurate census, is to reject the lessons of the Enlightenment and return to old Salem. This Court should not venture down that dark course.

**III. Even If Statistical Sampling May Not Be Used To Adjust The Census For Apportionment Purposes, It Must Be Used For Other Purposes, Such As Distribution Of Federal Funds And Redistricting.**

The district court held only that the use of statistical sampling to determine the population *for purposes of apportioning representatives in Congress among the States* violates 13 U.S.C. § 195, and enjoined the Federal Government only from using statistical sampling "to determine the population *for purposes of congressional apportionment*." J.S. at 63a-64a (Opinion). Nothing in the judgment could preclude the Secretary from using statistical sampling to adjust the Census data for non-apportionment purposes, such as the distribution of federal funds or redistricting. Indeed, under the district court's reading of 13 U.S.C. § 195, use of

<sup>29</sup> 15 *Writings of Thomas Jefferson* 164-65 (A.A. Lipscomb & A.E. Bergh eds., 1905) (Letter to Benjamin Waterhouse, March 3, 1818).

statistical sampling to adjust the census data for such purposes is *required*. Through the Census 2000 Report, the Secretary has determined that the use of statistical sampling is "feasible"; therefore, the Secretary "shall" authorize its use. 13 U.S.C. § 195.<sup>30</sup>

In *Wisconsin*, this Court held that the Secretary's decision not to adjust for the differential undercount in the 1990 census through use of a post-enumeration survey ("PES") was well within the constitutional bounds of discretion. See 517 U.S. at 19-20. "In light of the Constitution's broad grant of authority to Congress, the Secretary's decision not to adjust need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," *i.e.*, to provide a basis for reapportionment of Representatives in Congress. 517 U.S. at 20.

Census data have important consequences unrelated to the reapportionment function delineated in the Constitution. For example, the Federal Government considers census data when dispensing funds through federal programs to the States, and the States may use census results in drawing

<sup>30</sup> 13 U.S.C. § 141(c) requires the Secretary to produce tabulations of populations for use in legislative apportionment or districting of each State. Pursuant to 13 U.S.C. § 183(a), the Secretary is required to transmit to the President "the data most recently produced and published under this title" for use in "administering any law of the United States in which population or other population characteristics are used to determine the amount of benefit received by State, county, or local units of ... government." Neither requirement deals with apportionment of Representatives among the several States.



intrastate political districts. See *Wisconsin*, 517 U.S. at 6. *Wisconsin* did not consider whether statistical adjustment could be compelled for those non-apportionment functions of the census. Since *Wisconsin* was decided, the Secretary has revised his predecessor's determination and has concluded that the use of statistical sampling is necessary, desirable, and feasible. See generally J.A. at 34-340 (*Census 2000 and Census 2000 Operational Plan*). Thus, unlike the situation in *Wisconsin*, the Secretary is now required by section 195 to use statistical sampling to adjust the census results for non-apportionment purposes.<sup>31</sup>

Even if this Court affirms the district court's judgment, it should require adjustment of the 2000 Census for non-apportionment purposes. In effect, the Census Bureau must provide two sets of census data: an unadjusted set for apportionment, and an adjusted set for all other purposes. As a practical matter, the Census Bureau will not be able to use sampling in its Non-Response Follow-Up, but is required to proceed with the post-enumeration survey, or ICM. These adjusted figures will permit a fair allocation of federal funds based on actual population, and provide data that will permit redistricting of Congressional, state legislative, and local districts so as to achieve population equality "as nearly as is practicable."<sup>32</sup> Moreover, such use of adjusted data

<sup>31</sup> Because the Secretary had not then decided that the use of statistical sampling was "feasible" within the meaning of section 195 — but had instead rejected its use for all purposes — the Court did not address this issue in *Wisconsin*. 417 U.S. at 19 n.11.

<sup>32</sup> The Constitutional standard applicable to Congressional redistricting, derives from article I, section 2 of the Constitution

is entirely consistent with the requirements of the Constitution. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 527-28, 531, 535-36 (1969) (indicating that census data may be adjusted for intrastate redistricting if justified); *Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (same).<sup>33</sup>

and requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). The standard applicable to State redistricting derives from the Fourteenth Amendment's Equal Protection Clause and "requires that a State make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). Essentially the same standard also applies to local redistricting. See *Avery v. Midland County, Texas*, 390 U.S. 474, 484-485 (1968).

<sup>33</sup> Some circuit courts have also indicated that States are not required to use official census data when drawing Congressional districts and may adjust the data to correct for differential undercounting. See, e.g., *City of Detroit v. Franklin*, 4 F.3d 1367, 1373-74 (6th Cir. 1993), cert. denied, 510 U.S. 1176 (1994); *Assembly of State of California v. U.S. Dep't of Commerce*, 968 F. 2d 916, 919 n.1 (9th Cir. 1992); *Young v. Klutznick*, 652 F. 2d. 617, 624 (6th Cir. 1981), cert. denied, 455 U.S. 939 (1982). States are similarly not required to use official census data for drawing State legislative districts, *Burns v. Richardson*, 384 U.S. 73, 91 (1966), and this Court has not indicated that the situation is any different for local governments drawing local districts. Therefore, the Constitution does not prohibit the use of statistically adjusted data in conducting Congressional, State and local redistricting.

# CONCLUSION

For all the reasons stated above, the Court should reverse.

Respectfully submitted,

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**APPENDIX**

## APPENDIX

## U.S. CONST., ART. 2, § 1, CL. 3

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States and within every subsequent Term of Ten Years, in such Manner as they shall by Law direct. The Number of representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

## 13 U.S.C. § 141(a)

The Secretary [of Commerce] shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, including the use of sampling procedures and special surveys.



**13 U.S.C. § 141(b)**

The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

**13 U.S.C. § 195**

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary [of Commerce] shall, if he considers it feasible, authorize the use of the statistical method known as sampling in carrying out the provisions of this title.

**TABLE 1: UNDERCOUNTED POPULATIONS OF CERTAIN OF THE LOS ANGELES-APPELLEES**

(National Population Undercount: 1.6%)

City of Inglewood:	6.316%
City of Oakland:	4.932%
City of Houston:	3.933%
City of San Antonio:	3.918%
City of Los Angeles:	3.830%
City of Long Beach:	3.698%
Miami-Dade County:	3.690%
County of Los Angeles:	3.334%
City of New York:	3.232%
State of New Mexico:	3.074%
City and County of San Francisco:	2.899%
County of Alameda:	2.889%
City and County of Denver:	2.756%
City of Detroit:	2.671%
County of San Bernardino:	2.554%
City of Chicago:	2.395%
County of Riverside:	2.381%
City of San Jose:	2.377%
County of Santa Clara:	2.196%
City of Stamford:	1.256%

Source: U.S. Dept. of Commerce, Bureau of Census, *Report of the Committee on Adjustment of Postcensal Estimates*, Attachments 4, 11 and 12 (Aug. 7, 1992) (attached as Exhibit E of Memorandum in Support of Motion of the City of Los Angeles, et al. to Intervene as Defendants (Apr. 3, 1998)).

(1)  
No. 98-404

Supreme Court, U. S.

FILED

OCT 6 1998

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,  
*Appellants,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,  
*Appellees.*

On Appeal from the United States District Court  
for the District of Columbia

**BRIEF FOR APPELLEES  
NATIONAL KOREAN AMERICAN SERVICE &  
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## QUESTIONS PRESENTED

1. Whether the Census Act, 13 U.S.C. § 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary of Commerce from employing statistical sampling in the 2000 census in determining the population for the purpose of apportioning Representatives among the states.

2. Whether Article I, Section 2, Clause 3 of the Constitution prohibits the use of statistical sampling in determining the population for the purpose of apportioning Representatives among the states.



## PARTIES TO THE PROCEEDINGS

The United States Department of Commerce; William M. Daley, in his capacity as Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, in his capacity as Acting Director of the Bureau of the Census, are appellants in this case and were defendants below;

The United States House of Representatives is an appellee in this case and was the plaintiff below;

National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim, a resident of New York; Adeline M.L. Yoong, a resident of California; Michael Balaoing, a resident of California; Sovann Tith, a resident of California; Johnny Rodriguez, a resident of Texas; Chayo Zaldivar, a resident of Texas; Gilberto Flores, a resident of California; and Alvin Parra, a resident of California; and

Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M. Slaughter; Bennie G. Thompson, individually and in their capacities as members of the United States House of Representatives; and

Legislature of the State of California; The California Senate; John Burton, individually and as President Pro Tempore of the California Senate; Antonio Villaraigosa, individually and as Speaker of the California Assembly; and

City of Los Angeles, California; City of New York, New York; County of Los Angeles, California; City of Chicago, Illinois; City and County of San Francisco, California; Miami-Dade County, Florida; City of Inglewood, California; City of Houston, Texas; City of San Antonio, Texas; City and County of Denver, Colorado; City of Long Beach, California; City of San Jose, California; City of Stamford, Connecticut; City of Oakland, California; City of Cudahy, California; County of Santa Clara, California; County of San Bernardino, California; County Of Alameda, California; County of Riverside, California; State of New Mexico; City of Detroit, Michigan; City of Bell, California; City of Gardena, California; City of Huntington Park, California; U.S. Conference of Mayors; League of Women Voters of Los Angeles; and Carolyn Maloney, Christopher Shays, Tom Sawyer, Rod Blagojevich, Bobby Rush, Luis Guitierrez, John Conyers, Jose Serrano, Cynthia McKinney, Charles Rangel, Donald Payne, Howard Berman, Xavier Beccera, Loretta Sanchez, Julian Dixon, Henry Waxman, Maxine Waters, Esteban Torres, Sheila Jackson Lee, Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez, Carlos Romero-Barcelo, individually and in their capacities as members of the United States House of Representatives,

are appellees in this case and were intervenor-defendants below.

## RULE 29.6 LISTING

Organization of Chinese Americans, Inc. is the corporate parent of Organization of Chinese Americans, Los Angeles, California Chapter. Other appellee corporations associated in this action with National Korean Service & Education Consortium, Inc. have neither corporate parents nor subsidiaries required to be listed pursuant to Sup. Ct. R. 29.6.

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# In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,  
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v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,  
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On Appeal from the United States District Court  
for the District of Columbia

**BRIEF FOR APPELLEES**  
**NATIONAL KOREAN AMERICAN SERVICE &**  
**EDUCATION CONSORTIUM, INC., *et al.***  
**IN SUPPORT OF APPELLANTS**

## OPINION BELOW

The opinion of the district court, *J.S.1a*, is not yet reported.<sup>1</sup>

## JURISDICTION

The judgment of the district court, *J.S.66a*, was entered on August 24, 1998. Appellants filed their notice of appeal, *J.S.68a*, on August 25, 1998. The jurisdiction of this Court is invoked under the Departments of Commerce, Justice, and

<sup>1</sup> References to the jurisdictional statement are cited as "*J.S.*"; references to the joint appendix are cited as "*App.*"; references to the lower court's opinion are cited as "*Op.*"; references to the affidavit of Leobardo F. Estrada in the joint appendix are cited as "*Estrada Aff.*"

State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. - This Court noted probable jurisdiction on September 10, 1998.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clause 3 of the United States Constitution is reproduced at *J.S.*70a.

2. Amendment V of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Amendment XIV, Section 2 of the United States Constitution is reproduced in relevant part at *J.S.*3.

4. Sections 141 and 195 of Title 13, United States Code, are reproduced at *J.S.*70a-74a.

### STATEMENT OF THE CASE

Equal participation in the American political process depends upon an accurate and equal census count. Yet in the last census, the Census Bureau missed more than four million people, a disproportionate majority of whom were racial and ethnic minorities.<sup>2</sup> Sixty-nine percent of the people the Census Bureau failed to count were members of racial and ethnic minorities, even though members of those groups represent only about 25 percent of the total population.<sup>3</sup> Notwithstanding the fact that the 1990 census was the most expensive and most exhaustive effort in history to employ traditional census methods, it was the first census known to be less accurate overall than its predecessor.<sup>4</sup>

Recognizing that the next census would fall five million short of an accurate count if traditional methods were used exclusively, and that racial and ethnic minorities would again be omitted disproportionately from the census count, the Secretary of Commerce decided to use statistical sampling in conjunction with more traditional census techniques in 2000.<sup>5</sup> An expert panel of the National Academy of Sciences endorsing this approach called it "not just a solution to the cost and accuracy problems" of the decennial census, but

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<sup>2</sup> U.S. Census Bureau, *1990 Census of Population and Housing, Public Law 94-171 Data, Age By Race and Hispanic Origin* (visited Oct. 1, 1998) <<http://tier2.census.gov/pl94171/PL94data.htm>>.

<sup>3</sup> *Id.*

<sup>4</sup> *Census 2000 Report*, App.48.

<sup>5</sup> *Id.* at App.99.



"the *only* solution."<sup>6</sup> Plaintiff House of Representatives, however, seeks in this suit to prevent the implementation of this solution, which is the only practicable solution that addresses the disproportionate undercounting of minorities. National Korean American Service & Education Consortium, Inc. and the other Asian American and Latino organizations and individuals submitting this brief seek to protect their interests in ensuring that the nation's racial and ethnic minorities are counted equally with non-minority whites in the 2000 census.<sup>7</sup>

Because racial and ethnic minorities are likely to be missed in traditional census "head counts," areas in which many minorities live will be disproportionately undercounted as compared to the rest of the nation. It follows that those areas will disproportionately suffer the adverse effects of the undercount. More specifically, it is the people who live in those areas -- many or most of whom are the minorities who are likely to be uncounted -- who will disproportionately bear the brunt of those effects, including the dilution of their votes due to malapportioned political districts, the misallocation of

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<sup>6</sup> *Id.* at App.54.

<sup>7</sup> These Asian American and Latino organizations and individuals are National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim, a resident of New York; Adeline M.L. Yoong, a resident of California; Michael Balaoing, a resident of California; Sovann Tith, a resident of California; Johnny Rodriguez, a resident of Texas; Chayo Zaldivar, a resident of Texas; Gilberto Flores, a resident of California; and Alvin Parra, a resident of California.

congressional representation, and a diminished access to federal funding.

Statistical methodology has reached a level of sophistication that will enable the Census Bureau to alleviate the differential undercount in the 2000 census as well as to improve the overall numerical accuracy of census data without compromising the distributive accuracy of the data. At the same time, societal conditions make it increasingly difficult to conduct a reasonably accurate census using traditional survey techniques alone.<sup>8</sup> Although the Census Bureau is prepared to employ advanced scientific methodology to address the realities of modern society and improve the efficiency and accuracy of the 2000 census, the court below has interrupted this progress by prohibiting the use of sampling for purposes of apportionment. The injunction entered below will preserve the advantages of those communities that have been actually or relatively overcounted in the past at the expense of communities with substantial minority populations. As there are neither statutory nor constitutional impediments to the use of statistical sampling in enumerating the population for purposes of apportionment, the injunction should be vacated.

### **The Essential Failure of Traditional Enumeration Methods To Count Minorities Equally**

Every decennial census to date has failed to count a significant portion of the population. *See Wisconsin v. City of New York*, 517 U.S. 1, 6 (1996); *Karcher v. Daggett*, 462 U.S. 725, 732 (1983). This undercounting might be inconsequential if the undercount were spread evenly across the country. The severity of the undercount, however, varies

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<sup>8</sup> *See Census 2000 Report*, App.83 (stating that "the old [census] system is no longer adequate in light of societal changes").

from place to place and affects certain segments of the population more than others. *Op.*, J.S.30 n.2. For almost sixty years, the Census Bureau has acknowledged that the burden of this systemic undercounting falls disproportionately on racial and ethnic minority groups. *Wisconsin*, 517 U.S. at 7. This Court has also recognized this phenomenon, noting in *Karcher*, for example, that "it is accepted that the rate of undercount in the census for black population on a nationwide basis is significantly higher than the rate of undercount for white population." *Karcher*, 462 U.S. at 738 n.9; *accord*, *Wisconsin*, 517 U.S. at 7. The court below described the disproportionate undercounting of minorities as one of "the most troubling aspects of the census in the late 20th century." J.S.30 n.2.

The post-enumeration study of the 1990 census revealed an undercount rate that was dramatically higher for members of minority groups than for others. The undercount rate of the entire population was 1.8 percent, though the undercount rate for non-Hispanic whites was only 0.7 percent. In stark contrast, the undercount rate for minority groups was much greater: 5 percent for Hispanics, 4.4 percent for African Americans, and 2.3 percent for Asian/Pacific Islanders.<sup>9</sup> *App.*44, 48-49; *App.*437-38. Of the 4 million people missed overall in the 1990 census, 2.8 million were racial and ethnic minorities. See U.S. Census Bureau, *1990 Census of Population and Housing, Public Law 94-171 Data, Age by Race and Hispanic Origin* (visited Oct. 1, 1998) <<http://tier2.census.gov/pl94171/PL94data.htm>>.

<sup>9</sup> Thus, Hispanics were seven times more likely to be missed than non-Hispanic whites, African Americans were six times more likely to be missed, and Asian/Pacific Islanders three times more likely to be missed. See *Census 2000 Report*, *App.*49; *C.A.P.E. Report*, *App.*437.

Incremental improvements in traditional census methodologies made by the Census Bureau simply have not been able to counteract the complex social, economic, and cultural characteristics that tend to be associated with racial and ethnic minorities, and which make these groups more difficult to count than most of the population. These characteristics include "poverty, poor education and language abilities, irregular living arrangements, residence in high crime areas and fear or distrust of government."<sup>10</sup> See *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1095 (S.D.N.Y. 1987); see also *Census 2000 Report*, *App.*50-52 (reporting that high population mobility and high concentrations of unmarried individuals are also barriers to accurate census counts in minority communities). For example, even though the national undercount rate has consistently declined over the last six censuses (except in 1990, when it increased), the net undercount of African Americans has hovered around three to four percentage points above that of the population as a whole. *C.A.P.E. Report* at 4; MODERNIZING THE U.S.

<sup>10</sup> An ethnographic evaluation of the 1990 census closely examined the reasons for the net differential undercount in 29 sample areas. Manuel de la Puente, BUREAU OF THE CENSUS, *Why are People Missed or Erroneously Included by the Census: A Summary of Findings From Ethnographic Coverage Reports*, in 1993 RESEARCH CONFERENCE ON UNDERCOUNTED ETHNIC POPULATIONS, at 29 (May 5-7, 1993). The evaluation concluded that irregular and complex household arrangements, irregular housing, little or no knowledge of English (and in some cases, illiteracy in any language) and fear of government on the part of residents in sample areas contributed to the net undercount in those areas. *Id.* For example, ethnographers who conducted field research identified many instances in which a leaseholder of an apartment who could not afford the entire rent would rent out rooms, or parts of rooms, to unrelated individuals, resulting in an unstable and impersonal "household" structure. In one such arrangement, the leaseholder, his wife and two children lived in one of the three bedrooms in their apartment, while nine other Salvadoran immigrants, some related to each other and some not, shared the remaining two bedrooms. *Id.* at 32.



CENSUS 32-34 (Barry Edmonston & Charles Schultze eds., 1995).

If the members of society most likely to be missed in the census were evenly distributed throughout the country — complete integration — no single area would be undercounted more than another. But since hard-to-enumerate groups like minorities are concentrated in particular geographic areas, those areas are disproportionately undercounted as compared both to areas without such concentrations and to the nation as a whole. See *Karcher*, 462 U.S. at 738 n.9.

The majority of African Americans and Hispanics, for example, live in urban areas. James J. Harnett, Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VII To Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 103 & n.90 (1993). Within those areas, residential patterns tend to be segregated along racial lines. See U.S. Census Bureau, *Residential Segregation Summary Tables* (visited Oct. 3, 1998) <<http://www.census.gov/pub/hhes/www/housing/resseg/sumtabs.html>>.

This concentration of minorities within certain cities correlates with higher-than-average undercount rates in those cities. For example, Inglewood, California, with a minority population of 93 percent, had an undercount rate of 10.9 percent, a rate more than six times higher than the national rate. *Estrada Aff.*, App.413-14, ¶ 28. In El Paso, Texas, the minority population makes up 73.6 percent of the total population, and the entire city is undercounted at a rate of 4.45 percent. Yet in West Seneca, New York, where the population is 1.6 percent minority, the population was actually *overcounted* by 1.51 percent. U.S. Census Bureau, *1990 Census of Population and Housing, Public Law 94-171 Data, Age by Race and Hispanic Origin* (visited Oct. 1,

1998) <<http://tier2.census.gov/pl94171/PL94data.htm>>. One study of the undercount in Los Angeles County identified eight demographic and housing factors thought to affect the accuracy of census enumeration: per capita income, the existence of crowding, poverty, minority households, households containing sub-families, linguistic isolation, foreign born individuals and citizens hip. The study concluded that of all those factors, the percentage of minority households most closely correlated with the undercount percentage in the studied areas. S. Gregory Lipton & Leo F. Estrada, BUREAU OF THE CENSUS, *Factors Associated with Undercount Rates in Los Angeles County*, in 1993 RESEARCH CONFERENCE ON UNDERCOUNTED ETHNIC POPULATIONS, at 91-93 (May 5-7, 1993).

#### **The Differential Undercount Results in the Dilution of Minority Votes**

The right to vote is fundamental, “because preservative of all other rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). It can be abridged by dilution of the weight of a citizen’s vote just as effectively as an outright denial of the right. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In *Reynolds* this Court declared: “[T]he basic principle of representative government remains, and must remain, unchanged — the weight of a citizen’s vote cannot be made to depend on where he lives.” 377 U.S. at 567. Yet until the problem of differential undercounting of minorities is corrected, those living in political districts with large minority populations most likely will have their votes diluted as a result of living in districts drawn based on faulty census data.

Systemic census inaccuracy and the differential undercounting of minorities effectively precludes states from accurately drawing district lines around equal populations in

areas where minority concentrations are high, which in turn results in unequal voting power for the minorities (and non-minorities) residing therein. Census accuracy, after all, is effectively a prerequisite to equal representation. To protect the constitutional guarantees of equal protection and a representative form of government, this Court has decreed that the states must strive to achieve population equality among congressional districts "as nearly as is practicable." *Karcher*, 462 U.S. at 730 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)), and "substantial equality of population" among state and local legislative districts, *Avery v. Midland County*, 390 U.S. 474, 484-85 (1968); *Reynolds*, 377 U.S. at 579. In their attempts to achieve population equality, at least with respect to congressional districts, states are required to use the "best population data available." *Karcher*, 462 U.S. at 738; see also *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1968) (state must use census data unless more accurate data is available). It is indisputable, moreover, that states rely on census figures to draw both federal and state intrastate voting districts in attempting to fulfill their constitutional duties. See, e.g., *Wisconsin*, 517 U.S. at 6 ("States use the [census] results in drawing intrastate political districts"); *Young v. Klutznick*, 652 F.2d 617, 631 (CA6 1981) (Keith, J., dissenting) ("in recent American history the states have almost invariably used federally-supplied figures for reapportionment"); *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1093 (S.D.N.Y. 1987) ("New York State uses census figures for congressional and state legislative reapportionment.").

The immense disparities among census undercounts (and, in some cases, overcounts) from area to area result in voting districts which are of equal population in theory, but not in fact. Because districts with high minority populations are especially likely to suffer a disproportionate undercount, those districts are more likely to be overpopulated as

compared to their less-diverse counterparts, and the votes of their residents — many of whom, by definition, are minority group members — are more likely to be diluted.<sup>11</sup>

### **The Differential Undercount of Minorities May Distort the Apportionment of Representatives Among the States**

The effects of the differential undercount also may disadvantage an entire state with many minority residents. The Constitution mandates the use of census figures to apportion the Members of the House of Representatives among the states. U.S. CONST. art. I, § 2, cl. 3 & amend. XIV, § 2. As a result of the differential undercount, states with a high concentration of minorities are likely not to receive "credit" for all persons living within their borders, and residents of those states may not receive the number of congressional seats to which they would otherwise be entitled, depending on how the variances from actual population affect each state's share of the overall population of the United States. See *Wisconsin*, 517 U.S. 14. California and Texas, for example, have among the top five population percentages of minorities, at roughly 40 percent, and are among the five states with the greatest undercount. U.S. Census Bureau, *1990 Census of Population and Housing, Public Law 94-171 Data, Age by Race and Hispanic Origin* (visited Oct. 1, 1998) <<http://tier2.census.gov/pl94171/PL94data.htm>>.

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<sup>11</sup> In *Reynolds*, 377 U.S. at 563, the Court explained that where there is vote dilution, caused by allocating the same number of representatives to unequal numbers of constituents, "[t]wo, five, or 10 of [the voters living in a disfavored area] must vote before the effect of their voting is equivalent to that of their favored neighbor."



### The Differential Undercount Results in Diminished Federal Funds for Minorities

In addition to its direct effects on political power, the differential undercount of racial and ethnic minorities influences the allocation of federal funding for education, health, transportation, housing community services and job training.<sup>12</sup> See, e.g., *Wisconsin*, 517 U.S. at 1; *Baldrige v. Shapiro*, 455 U.S. 345, 353 n.9 (1982). Indeed, section 141(e) of the Census Act contemplates that federal benefits may be dispersed by "taking into account data obtained in the most recent decennial census." 13 U.S.C. § 141(e)(1). In 1990 alone, the federal government distributed about \$125 billion to state and local governments, half of which was based at least partially on census population totals. Michael P. Murray, *Census Adjustment and the Distribution of Federal Spending*, 29 DEMOGRAPHY 319, 319 (1992). A study of the effects of the 1990 undercount on the distribution of federal funds found that the miscounted jurisdictions that would have benefited from corrected census data would have received an average of \$56 more per each miscounted person. *Id.* at 321. To the extent that these monies enable

<sup>12</sup> For example, federal programs that allocate money according to formulas that incorporate total population data include certain subprograms under the Highway Planning and Construction Grant, 23 U.S.C. § 104(b)(6), Rehabilitation Services, 29 U.S.C. § 707, Medicaid, 42 U.S.C. §§ 1896 *et seq.*, Community Development Block Grants authorized by Title I of the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301 *et seq.*, Headstart, 42 U.S.C. §§ 9831 *et seq.*, and Child Health Services Block Grant, 42 U.S.C. §§ 701 *et seq.* See Michael P. Murray, *Census Adjustment and the Distribution of Federal Spending*, 29 DEMOGRAPHY 319, 322-28 (1992); *State v. Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992). Notably, the Social Services Block Grant program authorized by Subchapter XX of the Social Security Act, 42 U.S.C. § 1397(a), (b), allocates funding to states in direct proportion to the total population of each state. *Id.* at 321-22.

local and state governments to improve the quality of life of their residents and are based in part on census data, undercounted minority areas, and the individual minorities and non-minorities living therein, suffer by receiving less than their fair share of federal funding.

### The Legal Underpinnings of the Decennial Census

The Constitution provides that Representatives shall be "apportioned among the several States . . . according to their respective Numbers." U.S. CONST. art. 1, § 2, cl. 3. Originally, these "Numbers" were to be determined not by including all members of society in a numerical assessment, but rather, "by adding to the whole Number of free Persons, . . . excluding Indians not taxed, three fifths of all other Persons." *Id.* The Census Clause then provides that "[t]he actual Enumeration [of the states' respective Numbers] shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as [the Congress] shall by Law direct." *Id.* The Fourteenth Amendment recognized the status of former slaves as equal "persons" under the Constitution, and requires that the "respective Numbers" of the states for the purpose of apportionment include "the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV.

Congress has delegated to the Secretary of Commerce the responsibility for taking each decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a). Congress has also provided that sampling must be used whenever feasible, "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States." 13 U.S.C. § 195.

The statute does not say that sampling cannot be used for purposes of apportionment.

### The Census 2000 Plan

Soon after the inaccuracies of the 1990 census were brought to light, Congress passed the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (13 U.S.C. § 141 note). That Act directed the Secretary of Commerce to contract with the National Academy of Sciences to study the "means by which the Government could achieve the most accurate population count possible." *Id.* § 2(a)(1), 105 Stat. 635. The three panels established by the Academy "concluded that traditional census methods needed to be modified in response to societal changes, and that statistical sampling techniques would both increase the census' accuracy and lower its cost." *Op.*, J.S.4a.

In 1997, Congress passed a bill to amend 13 U.S.C. § 141(a) to provide that, "[n]otwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in [C]ongress among the several States." H.R. 1469, 105th Cong., 1st Sess., Tit. VIII(b)(1), at 65. That bill was vetoed by the President. *See* 33 Weekly Comp. Pres. Doc. 846 (June 9, 1997). Congress then enacted legislation directing the Department of Commerce to provide to Congress a "comprehensive and detailed plan" outlining its proposed methodologies for conducting the 2000 census. Pub. L. No. 105-18, Tit. VIII, 111 Stat. 217 (1997).

The details of the proposed methodology were presented to Congress in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *Report to Congress—The Plan for Census 2000*

(Aug. 1997). App.34-147. The *Report to Congress* set forth the failings of past decennial censuses and the circumstances the Bureau predicted would exacerbate those failings in the future, and also detailed the statistical sampling and other methodologies the Census Bureau plans to use in the 2000 census.<sup>13</sup> The *Report to Congress* stated that "[a]ll significant departures from the methodologies used in previous censuses have been endorsed by the [National Academy of Sciences], the Bureau's advisory committees, and the scientific community," and noted that the resulting census would be both more accurate and less costly than one using only traditional methodologies. App.42.

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<sup>13</sup> Experts at the Census Bureau and the three National Academy of Sciences panels concluded that the lower accuracy and increased cost of the 1990 census were the product of several societal trends. First, Americans were less often at home when enumerators visited because they were working more, and they were less willing to spend time filling out census forms. Second, more Americans have become mistrustful of government and concerned about their privacy. Third, increased amounts of "junk mail" obscured important documents like census forms. Finally, more Americans lived in remote or inaccessible housing. *Census 2000 Report*, App.50-52. The Census Bureau expects the census-taking environment to be even more difficult in 2000. *Id.* at App.52.

The plan for the 2000 census contemplates that statistical sampling will be used in conjunction with the more traditional enumeration methodology involving the mail-out/mail-back of census forms and nonresponse follow-up. In addition to the sampling used in the Postal Vacancy Check program, *see id.* at App.87, sampling methodology would be used in two new ways: (1) to complete the follow-up enumerations of those households that did not mail back their census forms; and (2) to refine the inherently flawed data obtained from the mail-out of census forms and personal visits to known addresses. *Id.* at App.88-98.



### The Lawsuit and Proceedings Below

After it was presented with the Census Bureau's plan, Congress enacted the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440. That Act provides in Section 209(b) that any person "aggrieved by the use of any statistical method in violation of the Constitution or any provision of law," other than the Act itself, can seek judicial relief. 111 Stat. 2481. The United States House of Representatives filed suit to enjoin the use of the Census Bureau's plan, asserting that the use of statistical sampling in determining the population for purposes of apportionment violates both the Census Act and Article I, Section 2, Clause 3 of the Constitution. The suit named the Department of Commerce, the Secretary of Commerce, the Census Bureau, and the Bureau's Acting Director (collectively the "Commerce Department") as defendants. National Korean American Service & Education Consortium, Inc. and the other individuals and organizations submitting this brief were one of four groups granted intervention under Fed. R. Civ. P. 24(b). *See Docket Entries, J.S.2a n.1.*

The Commerce Department and the four defendant-intervenor groups moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim, and the House of Representatives moved for summary judgment. The district court denied the motions to dismiss, and granted the motion for summary judgment. *J.S.66a-7a.* The district court concluded that the House of Representatives has Article III standing, that the matter is ripe for judicial review, that dismissal on equitable grounds was not appropriate, and that judicial review of the issues before it did not violate the doctrine of separation of powers. *J.S.11a-41a.*

Turning to the substance of the controversy, the district court also held that the use of statistical sampling in determining the population for purposes of apportionment would violate the Census Act. The court determined that the 1957 version of 13 U.S.C. § 195 prohibited the use of sampling to determine the population for purposes of apportionment, and concluded that the Act's 1976 amendments did not eliminate that prohibition. *J.S.50a-59a.* Further, the court found that "common sense and background knowledge" precluded a reading of the amended Section 195 to permit the use of statistical sampling in the apportionment process. *J.S.52a.* In addition, the court eschewed the argument that Section 141(a) of the Act authorized the use of sampling in determining the population for purposes of apportionment, holding that Section 195 dealt more specifically with sampling than does Section 141, and was "therefore controlling to the extent that the two provisions conflict." *J.S.61a.*

Having concluded that the Census Act prohibits the use of statistical sampling to determine the population for purposes of apportionment, the district court found no need to reach the constitutional question presented. *J.S.64a.*

### SUMMARY OF THE ARGUMENT

1. The plain text of sections 141(a) and 195 together demonstrate Congress's intent to permit sampling for a number of purposes, including the purpose of apportionment of Representatives in Congress among the several states. In section 141(a), Congress provides that sampling procedures and special surveys are permissible ways in which to undertake a decennial census of population. Section 195 requires the Secretary to use sampling if he deems it feasible. The introductory clause of section 195, however, exempts

sampling specifically for apportionment purposes from the general requirement that sampling be used. Contrary to the holding of the court below, this exception from the mandatory language of the statute does not prohibit the Secretary from using sampling if he believes it appropriate to do so.

The words of the statutory provisions speak for themselves, and the legislative history, both prior and subsequent, confirms that the Census Act allows the use of sampling in the apportionment process. Nonetheless, even if the statute is found to be ambiguous, the interpretation of the statute presently held by the agency should be given considerable weight. The agency endorses the use of sampling in the Census 2000 for a number of purposes, including for congressional apportionment.

2. Nothing in the Constitution prohibits the use of sampling for purposes of apportioning representatives. Neither the language nor the history of the Constitution offers any indication that the Framers intended to mandate or to prohibit any particular procedure for determining the numbers of the entire population. The records of the Federal Convention, moreover, demonstrate that the "actual Enumeration" mandated by the Constitution was the act of calculating a total based on the formula set forth therein that took into account the whole free population and three-fifths of the slave population, rather than the conduct of an "actual head count." With the ratification of the Fourteenth Amendment, the Constitution for the first time required that the former slaves be counted equally in the decennial "enumeration," giving new meaning to the term.

Although various types of household surveys have historically been the mainstay of the decennial census, past history is not determinative of the limits of Congress's

discretion set forth in the Constitution, which directs Congress to take the census "in such Manner as they shall by Law direct." It does not preclude the use of newly developed methodologies that better account for the entire population. Considerations of equal representation and equal protection, moreover, militate for the use of statistical sampling in the 2000 census in light of the differential undercount of racial and ethnic minorities that is certain to result if only traditional methods are used.

## ARGUMENT

### I. THE CENSUS ACT EXPRESSLY PERMITS THE USE OF STATISTICAL SAMPLING FOR PURPOSES OF APPORTIONMENT

#### **The Text of the Statute, in Plain and Unambiguous Terms, Permits the Use of Sampling for Purposes of Apportionment**

The district court erred in holding that the Census Act precludes the use of statistical sampling in determining the population for purposes of apportionment. The plain language of the statute is controlling absent a clear legislative intent to the contrary. *E.g., Russello v. United States*, 464 U.S. 16, 20 (1983).

The Census Act expressly provides the Secretary with ample discretion to use statistical sampling for apportionment purposes. Section 141(a) of the Census Act states:

The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in



such form and content as he may determine, *including the use of sampling procedures and special surveys.*

13 U.S.C. § 141(a) (emphasis added). On its face, this provision clearly authorizes the use of sampling for the “decennial census of population,” including for the purpose of apportionment. Furthermore, section 141(a) of the Census Act is the sole provision authorizing the Secretary to conduct the “actual Enumeration” required by Article I, Section 2, Clause 3 for congressional apportionment. *See Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) ([t]he Text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial “actual Enumeration”). Thus, it is clear that the “decennial census of population” to be conducted pursuant to section 141(a) — which entails the use of sampling — is to be used for apportionment. *Id.* at 19 (citing section 141(a) as the provision by which “Congress has delegated its broad authority over the census to the Secretary”); *see also* S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5467 (stating “[i]t is for the purpose of apportioning Representatives that the United States Constitution establishes a decennial census of population”). Indeed, the court below acknowledged that the text of section 141(a) — by its plain terms — permits sampling for the purposes of apportionment. The district court below stated “[S]ection 141(a) . . . standing alone appears to permit statistical sampling in congressional apportionment.” *J.S.* 61a.

Other provisions of the statute confirm that section 141(a) authorizes the Secretary to use sampling in the decennial census for the purpose of apportionment. Notably, section 141(b) states that “[t]he tabulation of total population by the States *under subsection (a) of this section*” is “required for the apportionment of Representatives in

Congress among the several states.” 13 U.S.C. § 141(b) (emphasis added). Furthermore, section 141(e)(2) expressly provides that “[i]nformation obtained in any mid-decade census [as opposed to the decennial census] shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.” 13 U.S.C. § 141(e)(2). No limitation is placed on the information obtained via the decennial census for apportionment purposes. Thus, taken together, the provisions of section 141 manifest a clear congressional intent that the Secretary be permitted to use “sampling procedures and special surveys” in conducting the “decennial census of population,” which is the census to be used for congressional apportionment.

Contrary to the district court’s holding, Section 195 is not inconsistent. Section 195 states:

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as “sampling” in carrying out the provisions of this title.

13 U.S.C. § 195. Nothing in the language of this provision prohibits sampling for any purpose. The purpose of this provision, rather than to prohibit sampling, is to *mandate* its use, wherever feasible, in every context except apportionment. Only with respect to apportionment does the Secretary retain absolute discretion to use or not to use sampling.

Although section 195 can be read consistently with section 141 to permit the use of sampling for purposes of

apportionment, the district court held that the two provisions are incompatible. The district court acknowledged that in some instances, the “except/shall sentence structure” as used in section 195 can be interpreted to permit discretion, *J.S.52a*, but found that in this case, based on “[c]ommon sense and background knowledge,” section 195 should be interpreted as a prohibition on the use of sampling for purposes of apportionment. *J.S.52a*. Starting with that premise that the two sections conflict, the district court went on to apply the rule of statutory construction dictating that when two provisions conflict, “[t]he more specific provision controls the general.” *J.S.61a*. The district court then found that section 195 is the more specific provision and thus controlling. *J.S.61a*.<sup>14</sup>

The district court erred, however, by disregarding the cardinal rule of statutory interpretation that a statute must be read consistently in order to construe each part or section in connection with every other part or section so as to produce a harmonious whole. *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-89 (1947) (“Our task is to give all of it [the entire statute] . . . the most harmonious, comprehensive meaning possible. . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.”); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 956, 962 (1998) (the “central tenet of interpretation” is “that a statute is to be considered in all its

<sup>14</sup> Only where the conflict between sections of a statute is inescapable should a choice be made between the specific and the general. *Aeron Marine Shipping Co. v. United States*, 695 F.2d 567, 576 (D.C. Cir. 1982); SUTHERLAND STATUTORY CONSTRUCTION, Vol. 2A § 46.05 (Norman Singer ed., 5th ed. 1992 & 1998 Supp.). Here, as discussed below, the “conflict” is not inescapable, but entirely avoidable. The two provisions — sections 141 and 195 — can be read consistently.

parts when construing any one of them” and “[i]f we do our job of reading the statute whole, we have to give effect to this plain command, even if doing that will reverse the longstanding practice under the statute and the rule”) (citations omitted).

In its opinion below, the district court acknowledged that this cardinal rule of statutory interpretation should be followed, noting that “[w]hatever strength there is to the claim that using statistical sampling in the apportionment enumeration does not violate the Census Act comes from the fact that section 195 must be read together with the other provision addressing sampling methodologies: section 141(a).” *J.S.59a*. Significantly, the district court did not agree with the House’s argument that section 141(a) and 195 were harmonious because section 141(a)’s references to sampling applied only to demographic data. Instead, the lower court held that the two provisions conflict because section 195 prohibits sampling for apportionment purposes while section 141(a) “appears to permit statistical sampling in congressional apportionment.” *J.S.61a*.

Given the district court’s own reading of section 141(a) to grant the Secretary discretion to use sampling, *J.S.61a*, and its view that the sentence structure of section 195 could be read “in some instances” to permit discretion, *J.S.52a*, the court should have read section 195 in the manner consistent with section 141(a) so that the two provisions do not conflict. Indeed, to interpret section 195 otherwise would render section 141(a) superfluous. See *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 877 (1991) (“Our cases consistently have expressed ‘a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment’”) (citations omitted).



Therefore, based on the plain language and the rules of statutory interpretation, the two provisions should be read together to permit the use of statistical sampling for a variety of purposes, including the purpose of congressional apportionment. As set forth above, the plain text of section 141 alone manifests Congress's intent to authorize the Secretary to use "sampling procedures and special surveys" in conducting the "decennial census of population," the census to be used for congressional apportionment. The analysis of the Act need go no further.

**Consistent with the Text, the Legislative History of the Statute Demonstrates Congress's Intent to Permit the Use of Sampling for Congressional Apportionment**

Further analysis of the statute, although unnecessary, supports the interpretation that permits the use of statistical sampling for purposes of apportionment. It is clear from the legislative history of both sections 141 and 195 that Congress's intent was to strengthen the use of sampling for a number of purposes, including the purpose of congressional apportionment.

Both sections were amended in 1976. The policy shift in these amendments to favor the use of sampling in the decennial census is evidenced in the legislative history of the Act. Significantly, Congress added the provision in section 141(a) to allow sampling without any limitations as to purpose, where previously, that provision had made no mention of sampling or special surveys at all. See Pub. L. No. 94-521, 90 Stat. 2459 (1976). Congress declared that the new language in section 141(a) was intended to "encourage the use of sampling and surveys in the taking of the decennial census." S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466 (1976).

Congress's intent was the same regarding the amendment to section 195. In contrast to the current version of section 195 which provides that sampling "shall" be used where "feasible," the 1957 predecessor stated only that "the Secretary *may*, where he deems it *appropriate*, authorize the use of the statistical method known as 'sampling.'" Pub. L. No. 85-207, 71 Stat. 481, 484 (1957) (emphasis added). With these changes, section 195 reads consistently with section 141. As with section 141, legislative history indicates that the intent of the 1976 amendment to section 195 was "to direct the Secretary of Commerce to use sampling and special surveys in lieu of total enumeration . . . whenever feasible," S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5464 (1976), and to "strengthen [ ] the congressional intent that, whenever possible, sampling shall be used." H.R. Rep. No. 94-1719, *reprinted in* 1976 U.S.C.C.A.N. 5476, 5481 (1976). Thus, in its 1976 amendments to the Census Act, Congress clearly reversed its previous failure to endorse sampling, and intended to encourage the use of the method for all purposes.<sup>15</sup>

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<sup>15</sup> Following the 1976 amendments to the Census Act, several courts have held — contrary to the court below — that the statute, with the current version of section 195, permits sampling for purposes of apportionment. For example, one federal district court held that while apportionment is exempted from the statute's mandatory requirement of statistical sampling, it is not prohibited. That court held that "the Census Act permits the Bureau to make statistical adjustments to the headcount in determining the population for apportionment purposes." *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); see also *City of New York v. United States Dep't of Commerce*, 34 F.3d 1114, 1125 (CA2 1994) (where the court concluded that "[r]eading §§ 141 and 195 together in light of their legislative history" indicates that "a statistical adjustment to the initial enumeration is not barred by the Census Act and indeed was meant to be encouraged"), *rev'd on other grounds sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *Young v.* (continued...)

### Subsequent Legislative Actions Further Confirm Congress's Intent

In addition to the 1976 history, subsequent legislative actions affirm that the 1976 amendments to the Census Act permit sampling for purposes of apportionment. While this Court has made clear that arguments predicated on subsequent legislative actions should be weighed with care, the Court long has recognized that such post-enactment history may be considered in the search for legislative intent. *United States v. Fisher*, 2 Cranch 358, 386 (1805) (Chief Justice Marshall stated that “[where] the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived”); *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 380-81 (1969) (stating that “[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction”); *Andrus, Secretary of the Interior v. Shell Oil Co.* 446 U.S. 657, 665-66 (1980) (holding that the intent of Congress can be “confirmed by actions taken in subsequent years by the Interior Department and the Congress”).

Since 1976, Congress has taken a number of legislative actions relating to the Census Act and the decennial census that affirm its intent to permit sampling for apportionment purposes. After the results of the 1990 decennial census became known, Congress passed the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (13 U.S.C. § 141 note) (1991). The Act had two purposes listed under two separate subsections: (a)(1) and (a)(2). Under subsection (a)(1), the Act directed the Secretary to contract with the National Academy of Sciences

to study the “means by which the Government could achieve the most accurate population count possible.” *Id.* § 2(a)(1), 105 Stat. 635. Then, with express reference to this subsection (a)(1), the Act further instructed the Academy to consider “the appropriateness of using sampling methods, in combination with basic data-collection techniques or otherwise, in the acquisition or refinement of population data, including a review of the accuracy of the data for different levels of geography (such as States, places, census tracts and census blocks).” *Id.* § 2(b)(1)(C), 105 Stat. 635. Congress obviously believed that the statute allowed the use of sampling since it directed the National Academy to consider the use of such a method. In fact, nowhere on the face of the statute is there any limitation on the purposes for which the sampling method may be used.

The plain text of subsection (a)(2) in comparison to subsection (a)(1) also evidences Congress's intent to permit the use of sampling for the purpose of determining the population (which in turn is used for apportionment), as opposed to using census information for other demographic or housing purposes. Whereas subsection (a)(1) addresses the “most accurate population count possible,” subsection (a)(2) addresses the ways to collect “other demographic and housing data.” *Id.* § 2(a)(2), 105 Stat. 635. Thus, Congress explicitly directed the National Academy to study the method of sampling “with respect to subsection (a)(1)” — which concerns the population count — in order to achieve the most accurate population count possible.

This distinction between “population” and “other demographic” uses is also important because it clearly discredits the plaintiff's argument below. As the district court noted, the plaintiff argued that both sections 195 and 141(a) could be read together to prohibit sampling because “section 141(a)'s references to sampling and special surveys

<sup>15</sup> (...continued)

*Klutznick*, 497 F. Supp. 1318, 1334-35 (E.D. Mich. 1980), *rev'd on jurisdictional grounds*, 652 F.2d 617 (CA6 1981).



*applies only to the myriad of demographic data that the Bureau collects in conjunction with the decennial enumeration.*" J.S.60a (emphasis added). However, with this subsequent Act, Congress expressly directed the National Academy to consider sampling for the purpose of achieving "the most accurate population count possible" and not on demographic purposes. Therefore, with section 141(a), Congress clearly intended that sampling methods be used for all purposes as the Secretary deemed feasible.

The legislative history of this subsequent Act further confirms Congress's intent to permit the use of sampling for purposes of apportionment. In discussing the need to study sampling methods in order to "achieve an accurate census," the House Report expressly states that "[i]nformation collected during the decennial census is used for *the allocation of political representation*, as well as federal and state program funds." H.R. Rep. No. 102-227 (1991) (emphasis added). In other words, the House Report discusses the issue of sampling in the context of congressional apportionment, and significantly, makes no reference to any restriction on the use of sampling for apportionment purposes.<sup>16</sup>

Years later in 1997, Congress attempted to amend section 141(a) to prohibit "sampling or any other statistical procedure, including any statistical adjustment" in any determination of population for purposes of the apportionment of Representatives. H.R. 1469, 105th Cong.,

<sup>16</sup> This House Report accompanies legislation that was passed unanimously by the House. 137 Cong. Rec. S14327 (daily ed. Oct. 3, 1991).

1st Sess., Tit. VIII(b)(1).<sup>17</sup> Strikingly absent from Congress's proposed amendment was any mention that section 195 already prohibited sampling methods for apportionment purposes. Such an amendment obviously would have been unnecessary had section 195 already prohibited the use of sampling.

Therefore, consistent with the text of sections 141(a) and 195, the legislative history to that text, both prior and subsequent, clearly manifests Congress's intent to permit the use of sampling for apportionment purposes.

#### **If the Statute is Deemed Ambiguous, Under *Chevron*, Considerable Deference Should Be Given to the Census Bureau's Current Interpretation of the Statute**

Even if the statute is found to be ambiguous, considerable weight should be accorded to the current agency's interpretation of the statutory scheme it is entrusted to administer. *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 844 (1984).<sup>18</sup> Although the district court (in a footnote) stated that the court was not required to give deference to the agency's interpretation because the "Secretary of Commerce has reversed his position on this issue," J.S.46a-47a, n.11, the

<sup>17</sup> This bill was vetoed by the President. See 33 Weekly Comp. Pres. Doc. 846 (June 9, 1997) (veto message).

<sup>18</sup> See also *Regions Hospital v. Shalala, Secretary of Health and Human Services*, \_\_ U.S. \_\_, 118 S. Ct. 909, 915 (1998) (stating "[I]f the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight"); *Red Lion*, 395 U.S. at 381 (recognizing the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong").

law is to the contrary. The principles of *Chevron* firmly hold that the agency's interpretation of a statute — even if it varies over the years — is entitled to considerable weight.

In *Chevron*, as here, the agency in charge had to consider competing and often conflicting interests in a technical field. This Court held:

Our review of the EPA's varying interpretations of the word "source" — both before and after the 1977 Amendments — convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly — not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

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[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent

administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*Chevron*, 467 U.S. at 863-64, 865-866. See also *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) ("An agency is not required to 'establish rules of conduct to last forever,' but rather 'must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances.'") (citations omitted); *Smiley v. Citibank, N.A.*, 517 U.S. 735, 742 (1996) (holding that "[o]f course the mere fact that an agency interpretation contradicts a prior agency position is not fatal" and that "change [in agency's position] is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency").

Here, the agency in charge of administering the decennial census recommends that sampling be used in the 2000 census for a variety of purposes, including congressional apportionment. Under *Chevron* and its progeny, the Census Bureau's position should be respected. Contrary to the district court's characterization of the agency's "reversal" on the issue of sampling, the Census Bureau consistently has interpreted the statute to permit sampling for apportionment purposes for more than a decade in anticipation of the 1990 and 2000 censuses. As for the



1980 census, although the director of the Bureau adopted the view that sampling was not permitted by statute to adjust the 1980 population figures, the Census Bureau at that time was more concerned about whether sampling was operationally feasible as opposed to legally feasible. In 1980, the head of the Census Bureau stated, "[W]hen consulted, the Bureau has steadfastly maintained that, *even if it were legal*, a statistically defensible underenumeration adjustment of the census counts to be used for apportionment was not possible given statutory time constraints and the experimental and developmental character of possible undercount adjustment techniques." 45 Fed. Reg. 69,372 (1980) (emphasis added).

Since the 1980 decennial census was taken, the Census Bureau consistently has supported the use of sampling for all purposes as long as it was operationally feasible. In preparation for the 1990 decennial census, as the district court noted, the head of the Census Bureau actually planned to use the method of sampling to adjust census data obtained from the 1990 decennial census. The Secretary rejected the plan on the ground that the sampling method was not yet sufficiently accurate, *not* on the ground that sampling was prohibited by the Census Act (or the Constitution). In explaining his decision against statistical adjustment of the 1990 census figures, the Secretary explicitly stated that "[w]hile not free from doubt, it appears that the Constitution might permit a statistical adjustment, but only if it would assure an accurate population count," 56 Fed. Reg. 33582, at 33,605 (1991); and he observed that "[w]hile judicial opinion is unsettled on the question . . . , the majority of courts considering this issue have ruled that section 195 permits an adjustment if the adjustment method makes the census more accurate," *id.* at 33,606. Thus, the Secretary's determination to use sampling in conducting the decennial census for the year 2000 for whatever purpose he deems

feasible, including for the purpose of apportionment, should be given considerable deference.

The district court also reasoned that the agency's interpretation should not be given deference because "the Secretary has not amply justified his change of interpretation with a 'reasoned analysis.'" *J.S.*46a-47a, n.11 (citations omitted). The Secretary's decision to use sampling has the full support of the top scholars and experts in this field, including, most notably, the National Academy of Sciences, which was hired by Congress to consider whether sampling should be used in the year 2000 census. *See Census 2000 Report, App.*53-55, 83-85. Thus, in accordance with the principles of *Chevron*, the current agency's interpretation of the statute should prevail, and sampling should be allowed to be used in the Year 2000 Census for the purpose of congressional apportionment.

## II. THE CONSTITUTION DOES NOT PROHIBIT THE USE OF STATISTICAL SAMPLING IN ENUMERATING THE POPULATION FOR PURPOSES OF APPORTIONMENT

The district court did not reach the question of whether the use of the phrase "actual Enumeration" in Article I precludes the use of statistical sampling in the 2000 census for purposes of apportionment. If the lower court erred in interpreting the Census Act to prohibit sampling, this issue must be considered.

There is scant basis for plaintiff's argument in the district court below that the words "actual Enumeration" in the context of the Census Clause mandate a "headcount" of the population — a counting of every person one by one. There is, however, considerable reason for rejecting this interpretation. To begin with, plaintiff's restrictive

interpretation of these words is discordant with the conventions of English syntax. It is also contradicted by the context of the sentence and the context of the paragraph in which the words appear. More significantly, the records of the Federal Convention, at which the provisions of the Constitution were drafted, redrafted, and discussed at great length, provide no basis whatsoever on which to imbue these words with such a meaning. To the contrary, the evolution of the drafting and the contemporaneous interpretations of the Census Clause reveal a meaning altogether different from that advanced by the plaintiff. Finally, an interpretation of the Census Clause that precludes the use of the most accurate and evenhanded method of enumeration available to Congress is inconsistent with the constitutional goals of equal representation and equal protection.

**The Language of the Census Act Does Not Prescribe a Particular Method of Determining the Total Population Figure**

There is no support for the plaintiff's argument that the words "actual Enumeration" suffice to eradicate the discretion the Constitution explicitly gives to Congress, within the *same sentence* of Article I, to conduct the decennial enumeration "in such Manner as they shall by Law direct."

It may be tempting for the ear to consider the words "actual" coupled with the word "enumeration" as an emphatic directive, compelling the listener to use a particular method of enumeration, or as plaintiff argues, to count one by one. But a careful reading of the text of Article I divests

the phrase of this connotation.<sup>19</sup> The first sentence provides that numbers for purposes of apportionment should be determined for each state according to a particular formula that took into account the whole of the free population and three-fifths of the slave population. The second provides for the timing of "*the* actual enumeration," referring to the act of calculating the number previously discussed, rather "*an* actual enumeration," which would signify the introduction of "enumeration" as a new idea without a referent. The same sentence, moreover, expressly provides that the manner of conducting the enumeration is left to the will of Congress. In addition, contrary to the plaintiff's usage, "actual" is not used in the Census Clause to contrast "enumeration" with all other methods, but to contrast the numbers determined by use of the required formula with those underlying the interim

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<sup>19</sup> Article I, § 2, cl. 3 provides:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least One Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.



apportionment of Representatives set forth in the Constitution. Thus, the words "actual Enumeration" command that there be an act resulting in a calculation of the states' "respective Numbers" according to a formula; they do not suggest that a particular process must necessarily be used to obtain the base number upon which to apply this formula.

**Evidence of the Framers' Intent Shows That a Specific Method Determining the Numbers of the Total Population Was Never Contemplated**

Even if the context of "actual Enumeration" did not explain the meaning of the words, the plaintiff's proposed interpretation of "actual Enumeration" is also unsupported by constitutional history evidencing the intent of the Framers. While the word "Enumeration" is susceptible of several meanings, the evolution of the Census Clause demonstrates that in directing Congress to determine the numbers on which representation would be based, the Framers intended to mandate only two things: that the Congress should apply a particular formula to derive a number for apportionment, and that Congress should make this calculation at specified intervals. The federal constitutional convention gives no indication that the Constitution was understood to require or to forbid any particular methodology in conducting the decennial determination of the numbers of the population as a whole.

An examination of the evolution of the clause makes clear that the "Enumeration" with which the Framers were concerned was not a specific method to be used to count the total population. Rather, the "Enumeration" was an act leading to a particular result, or the calculation of the number on which apportionment would be based. In other words, the "actual Enumeration" required by the Census Clause resulted when the constitutional formula that accounted for free

persons and slave persons differently was applied to the numbers of the population as a whole.

The phrase "actual Enumeration" did not become part of the draft Constitution until it was submitted to the Committee of Style late in the Federal Convention. Early discussions about the periodic determination of the basis of apportionment used the word "census," rather than "enumeration." During these proceedings, the word "census" was commonly used to refer not to a headcount of the population, but instead to the final calculation of the numbers on which the apportionment of representatives would be based, counting five slaves as three persons. These numbers, of course, could be derived only by initially determining the true numbers of both slaves and free persons. The "census" number at issue early in the proceedings, however, was not the underlying one to which the formula was to be applied, but rather the end-figure derived by the application of the formula. The method of making the count of the entire population was not at issue, except insofar as it was thought prudent to commit the task to the federal Legislature. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 580 (Max Farrand ed., 1966) (hereinafter "Farrand, Records").

This idea of the census as an act of obtaining an end-figure based on a formula rather than as a process of counting each individual is illustrated in the motion by Hugh Williamson at the Federal Convention on July 11, 1787:

that in order to ascertain the alterations that may happen in the population & wealth of the several States, a census be taken of the free white inhabitants and 3/5ths of those of other descriptions . . . and that the Representation be regulated accordingly.

1 Farrand, Records at 579.

Edmund Randolph's motion of July 12, 1787 echoes this usage, as he suggests that a periodic "census" be taken according to a stated ratio, proposing

that in order to ascertain the alterations in Representation that may be required from time to time . . . a census shall be taken within two years from the 1st. meeting of the Genl. Legislature . . . of all the inhabitants in the manner and according to the ratio recommended by Congress in their resolution of the 18th day of Apl. 1783; (rating the blacks at 3/5ths of their number) and that the Legislature of the U.S. shall arrange the Representation accordingly.

1 Farrand, Records at 594.<sup>20</sup> The resolution of the Continental Congress on which Mr. Randolph based his proposal, notably, provides that the number derived from the stated ratio "shall be triennially taken and transmitted to the United States in Congress assembled, *in such mode as they shall direct and appoint.*"<sup>21</sup> 24 JOURNALS OF THE

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<sup>20</sup> The resolution ultimately passed by the grand Committee on July 16 read in pertinent part: "Resolved that a Census be taken within six years from the first Meeting of the Legislature of the United States, and once within the term of every Ten years afterwards of all the inhabitants of the United States in the manner and according to the ratio recommended by Congress in their resolution of April 18. 1783 — and that the Legislature of the United States shall proportion the direct Taxation accordingly." 2 Farrand, Records at 14.

<sup>21</sup> The 1783 resolution provided that expenses incurred for the common defense or general welfare

(continued...)

CONTINENTAL CONGRESS 260 (Gaillard Hunt ed., 1922) (emphasis added). Ultimately, the manner of conducting the decennial census required by Article I was likewise left to the discretion of Congress.

The Committee of Detail's report of the draft Constitution presented on August 6, 1787 revealed that the use of the word "census" in the context of apportionment had been abandoned and replaced by language more unambiguously indicating that the Legislature's mandate was to engage in the act of determining the number which would form the basis of apportionment. The provisions that would evolve into Article I, Section 2, clause 3 were set forth in three separate sections of the draft. The first of these sections provided for an initial apportionment of representatives that would stand until the official number of inhabitants was determined:

The House of Representatives shall, at its first formation, and until the number of citizens and inhabitants shall be taken in

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<sup>21</sup> (...continued)

shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes, in each State; which number shall be triennially taken and transmitted to the United States in Congress assembled, in such mode as they shall direct and appoint.

24 JOURNALS OF THE CONTINENTAL CONGRESS 260 (Gaillard Hunt ed., 1922).



the manner herein after described, consist of sixty-five members . . . .

2 Farrand, Records at 178.

The next section of the draft provided that the apportionment of representatives would bear a certain relationship to the official number derived:

the Legislature shall . . . regulate the number of representatives by the number of inhabitants, according to the provisions herein after made, at the rate of one for every forty thousand.

*Id.*<sup>22</sup> Finally, the provisions for determining the number of inhabitants for purposes of apportioning representatives were set forth in Article VII, in the section describing the scheme of direct taxation:

The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants . . . and three fifths of all other persons (except Indians not paying taxes) . . . which number shall, within six years after the first meeting of the Legislature . . . be taken in such manner as the said Legislature shall direct.

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<sup>22</sup> The draft was amended on August 8, 1787 to replace the words "according to the provisions hereinafter made" with the words "according to the rule hereafter to be provided for direct taxation." 2 Farrand, Records at 219.

2 Farrand, Records at 182-83. Under the draft report, the Legislature thus was not directed to undertake any particular process for counting the population, but rather merely was given the mandate to determine a number for apportionment resulting from the application of the formula prescribed. Aside from the application of this formula, the particulars of the process were left to the Legislature to decide.

In the later draft of the provisions submitted to the Committee of Style, the nature of the constitutional mandate remained essentially unchanged:

The proportions of direct taxation shall be regulated by the whole number of free citizens and inhabitants . . . and three fifths of all other persons . . . (except Indians not paying taxes) which number shall, within three years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such a manner as the said Legislature shall direct.

2 Farrand, Records at 571.

On September 12, 1787, the Committee of Style presented another, tidier version of the document. Article I now contained in one section the provision for apportionment of representatives and direct taxes. It also separated the constitutional formula for this apportionment and the instructions for its periodic calculation into two sentences:

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the

whole number of free persons . . . , and excluding Indians not taxed, three fifths of all other persons. *The actual enumeration* shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.

2 Farrand, Records at 590-91 (emphasis added). "The actual enumeration" that was mandated, rather than being a particular process of counting heads, was merely the act of calculating a final number pursuant to a formula. There is no indication in the records of the Federal Convention that any of the Framers perceived a substantive change had been made by the Committee of Style in inserting the words "actual enumeration."

That the Framers thought of the "enumeration" or "census" in the apportionment context as the calculation of a total using the prescribed constitutional formula, rather than as a head-counting process, is apparent in James Madison's discussion of the constitutional basis of apportionment in Federalist No. 54. Madison there notes that the southern states might argue "that the slaves, as inhabitants, should have been admitted into the census according to their full number, in like manner with other inhabitants . . . ." THE FEDERALIST No. 54 (James Madison) at 333 (Isaac Kramnick ed., 1987). In Federalist No. 55 Madison again uses the word "census" in the apportionment context to mean "determination according to the formula set forth in the Constitution," predicting that "the first census, will, at the rate of one for every thirty thousand raise the number of representatives to at least one hundred." *Id.* No. 55 at 337.

At least one delegate to the Federal Convention, moreover, expressed an understanding that the constitutional mandate of an "enumeration" required no more of Congress than the making of an estimate when determining the entire population. Luther Martin argued that the interim apportionment of Representatives set forth in the Census Clause disguised the inevitable impact of the actual apportionment, which would give larger states undue power:

I have taken some pains to obtain some information of the number of free men and slaves in the different States, and I have reason to believe, that if the estimate was *now* taken, which is directed, and one delegate to be sent for every thirty thousand inhabitants, that Virginia would have at least *twelve* delegates . . . . If I am right, Mr. Speaker, upon the enumeration being made, and the representation apportioned according to the rule prescribed, the *whole number* of delegates would be *seventy-one* . . . ."

Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings Lately Held at Philadelphia, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 2.4.45 (Herbert J. Storing ed., 1981) (emphasis in original).

After prolonged debate, the Framers agreed upon language in the Census Clause that directed Congress to give a reduced value to the slave population when calculating the numbers on which apportionment would be directly based, and to make the calculation for apportionment at specified intervals. The clause left the method of counting the population as a whole to the complete discretion of Congress.



### The Fourteenth Amendment Commands That Congress Count All Persons Equally

Once the Fourteenth Amendment was ratified, the meaning of the word "enumeration" carried the obligation to count all inhabitants equally, with the exception of Indians not taxed.<sup>23</sup> The Fourteenth Amendment's reference to "counting the whole number of persons in each State" no more requires a "head count" of the population than does the text of Article I. See U.S. CONST. amend. XIV. Like Article I, this language mandates no particular method for ascertaining the total number of inhabitants. Rather, the phrase "counting the whole number" was meant to "abrogate[] so much of the corresponding clause of the original constitution as counted only three-fifths" of the numbers of slaves. *Elk v. Wilkins*, 112 U.S. 94, 102 (1884). The Fourteenth Amendment rejected the formula set forth in Article I, commanding instead that the respective numbers of the states be determined by "counting the whole number of persons," and requiring Congress to take full account of all persons (except Indians not taxed) when determining the population for purposes of apportionment.

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<sup>23</sup> Section 2 of the Fourteenth Amendment provides in pertinent part:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

U.S. CONST. amend. XIV, § 2.

### Census Methods of the Past Do Not Constrain the Discretion of Congress

Justice Frankfurter has noted that "[n]ot the least characteristic of great statesmanship which the Framers manifested was the extent to which they did not attempt to bind the future." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Frankfurter, J. concurring). Although household surveys of various forms have been the mainstay of previous decennial censuses, the historical use of those techniques does not militate for a restrictive interpretation of the Constitution:

In mere mechanics of government and administration we should, so far as the language of the great Charter fairly will permit, give Congress freedom to adapt its machinery to the needs of changing times.

*National Mut. Ins. Co. of District of Columbia v. Tidewater Transfer Co., Inc.*, 337 U.S. 582, 585-86 (1949). In the context of this case, the societal conditions that increasingly hinder an accurate and equal census necessitate the use of new tools to fulfill the constitutional goal of equal representation. It is of no moment that the statistical tools chosen for the 2000 census were unforeseen by the Framers and unavailable until recent times. Although historical acceptance may support the idea that a particular action is constitutional, the limits of the Constitution are not delineated by historical practice. Chief Justice Marshall observed in *M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819), that

[t]he sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by

which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

#### **A Bar to Statistical Sampling is Inconsistent With the Goals of Equal Representation and Equal Protection**

A prohibition of the use of statistical sampling for apportionment purposes would prevent the use of the only method practicable for counting minorities equally with the rest of the population, undermining the constitutional goals of both equal protection and equal representation. It cannot be gainsaid that the Framers did not intend for Article I to stand alone in defining Congressional power. This Court has recognized that "[a]s no constitutional guarantee enjoys preference, so none should suffer subordination or deletion." *Ullmann v. United States*, 350 U.S. 422, 428 (1956). Thus, in order for the decennial enumeration to comport with the Constitution, that enumeration must be consistent with the constitutional rights of due process and equal protection guaranteed by the Fifth Amendment, as well as with the constitutional goal of equal representation. An interpretation of the Census Clause that would unnecessarily perpetuate a differential undercount of minority populations in the decennial census would be inconsistent with these constitutional rights.

This Court has declared that "[t]he text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). The Secretary's discretion in choosing a method of enumeration is limited only insofar as it must be exercised consistent with the language of the Constitution and the goal of equal representation. *Wisconsin*, 517 U.S. at 19-20; *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992). The Secretary's decision to adopt a method of enumeration that better accounts for the entire population, including minorities, is wholly consistent with both the text of the Constitution and the constitutional goal of equal representation.

Census data which underestimate the size of the minority population result in unequal voting districts and political representation, and disproportionately affect communities with a high concentration of minorities. The Census Clause clearly does not mandate continued reliance by the Secretary on traditional census methods which demonstrably undercount the population and always disproportionately undercount minorities, especially in the face of an alternative methodology demonstrated on this record to be superior by every measure of accuracy. Thus, not only is the Secretary's decision to use sampling in the decennial census consistent with the ideals of equal representation, but it may well be mandated by considerations of equal protection. Indeed, vote dilution implicates equal protection principles, as the Court in *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), noted: "The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places, as well as of all races."

The plaintiff's contention that sampling is prohibited, on the other hand, is irreconcilable with the constitutional objective of equal representation in the House for equal



numbers of people. The Constitution commands that Representatives be chosen "by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. This means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). Equal representation cannot be achieved if the form of the decennial enumeration is to be given priority over its accuracy, and it is evident that the Framers intended no such result. This Court has long recognized the importance of striving for parity in intrastate voting districts, notwithstanding inherent imperfections of census data, observing that "[a]s between two standards — equality or something-less-than equality — only the former reflects the aspirations of Art. I § 2." *Karcher v. Daggett*, 462 U.S. 725, 732 (1983). Because census data are the foundation of state redistricting decisions, the goal of equal voting districts is no less important in the federal government's enumeration of the population than it is in state governments' use of the federal data. Accurately determining the number of a state's inhabitants is crucial in fulfilling the Framers' intent and the constitutional goal of equal representation, and a failure to strive toward accuracy using the best practicable census methods is inconsistent with that goal.

The differential undercount impairs the rights of minorities to equal representation, potentially diminishes congressional representation for states with substantial minority populations, and deprives minority communities of their fair share of federal funding. The Commerce Department's decision to use statistical sampling in the 2000 census would alleviate the problem of the differential undercount and, for the first time, count the minority population equally with non-minority whites. The decision to use sampling is consistent, therefore, with both the letter and the spirit of the Constitution.

## CONCLUSION

The Court should reverse the district court and vacate the order enjoining the use of statistical sampling in the 2000 census for the purpose of apportioning Representatives among the states.

Respectfully submitted,

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No. 98-404

Supreme Court, U.S.

FILED

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In The  
**Supreme Court of the United States**  
October Term, 1998

UNITED STATES DEPARTMENT  
OF COMMERCE, ET AL.,

*Appellants,*

vs.

UNITED STATES HOUSE  
OF REPRESENTATIVES, ET AL.,

*Appellees.*

On Direct Appeal From The United States  
District Court For The District Of Columbia

**BRIEF ON THE MERITS OF CALIFORNIA  
LEGISLATURE, ET AL.**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Census Act prohibits the Secretary of Commerce from using statistical sampling to ensure that the year 2000 census for apportionment purposes will be as accurate as it is within his power to make it.

2. Whether Article I, Section 2, Clause 3 of the United States Constitution prohibits the Secretary of Commerce from using statistical sampling to conduct the decennial census for apportionment purposes when there is no dispute that sampling will provide a more accurate result.



**PARTIES TO THE PROCEEDING  
IN THE COURT BELOW**

The parties to the District Court proceedings are the following:

**Plaintiff:**

United States House of Representatives.

**Defendants:**

The United States Department of Commerce; William M. Daley, in his capacity as Secretary of the United States Department of Commerce; Bureau of the Census; James F. Holmes, in his capacity as Acting Director of the Bureau of the Census.

**Intervenors as Defendants:**

**Legislature of the State of California, et al.:** Legislature of the State of California; the California Senate; John Burton, individually and as President Pro Tempore of the California Senate; the California Assembly; Antonio Villaraigosa, individually and as Speaker of the California Assembly.

**Richard A. Gephardt, et al.:** Richard A. Gephardt, Danny K. Davis, Juanita Millender-McDonald, Lucille Roybal-Allard, Louise M. Slaughter, Bennie G. Thompson, individually and in their official capacities as Members of the United States House of Representatives.

**City of Los Angeles, et al.:** City of Los Angeles; City of New York; County of Los Angeles; City of Chicago; City and County of San Francisco; Miami-Dade County; City of Inglewood; City of Houston; City of San Antonio;

**PARTIES TO THE PROCEEDING  
IN THE COURT BELOW - Continued**

City and County of Denver; City of Long Beach; City of San Jose; City of Stamford; City of Oakland; City of Cudahy; County of Santa Clara; County of San Bernardino; County of Alameda; County of Riverside; State of New Mexico; U.S. Conference of Mayors; League of Women Voters of Los Angeles; Carolyn Maloney, Christopher Shays, Tom Sawyer, Rod Blagojevich, Bobby Rush, Luis Gutierrez, John Conyers, Jr., Jose Serrano, Cynthia McKinney, Charles Rangel, Donald Payne, Howard Berman, Xavier Beccera, Loretta Sanchez, Julian Dixon, Henry Waxman, Maxine Waters, Esteban Torres, Sheila Jackson Lee, individually and in their official capacities as Members of the United States House of Representatives; City of Detroit; City of Bell; City of Gardena; City of Huntington Park; Members of Congress Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez and Carlos Romero-Barcelo.

**National Korean American Service & Education Consortium, Inc., et al.:** National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kum; Adeline M.L. Yoong; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra.

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*United States House of Representatives v. United States Department of Commerce*, 11 F. Supp.2d 76, 1998 WL 556342 (D.D.C., Aug. 24, 1998)

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**STATEMENT OF JURISDICTION IN THIS COURT**

This Court has jurisdiction pursuant to section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998 ("Appropriations Act of 1998"), Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2440, 2482 (1997). The text of this provision is set forth in the Appendix hereto at App. 6.

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**CONSTITUTIONAL PROVISIONS  
AND STATUTES INVOLVED**

The constitutional provisions and statutes involved herein, whose text is set forth in the Appendix hereto are as follows:

U.S. Constitution, Article I, Section 2, Clause 3

U.S. Constitution, Article I, Section 9, Clause 4

U.S. Code, Title 13, Section 141

U.S. Code, Title 13, Section 195

Pub. L. No. 105-119, 111 Stat. 2440, 2482 (1997),  
Section 209(e)(1).

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## STATEMENT OF THE CASE

The Great Compromise established a system of federal government in which the small states were each guaranteed two senators and at least one representative and the large states were guaranteed that, in all other respects, representation in the Congress would be based upon proportionality. Article I, Section 2 provides that this proportional representation shall be according to each state's population. U.S. Const. art I, § 2. The constitutional commitment to these values has been reflected in continuing efforts to produce an accurate census. To that end, the Census Bureau and the Department of Commerce, to whom the decennial census has been entrusted, have over the years tested and then implemented an array of conventional and unconventional techniques, technologies and strategies for improving census accuracy. U.S. Department of Commerce, Bureau of the Census, *Report to Congress - The Plan for Census 2000* (August 1997) ("*Census 2000 Report*"), Joint Appendix ("*Joint App.*") 46-47; see generally Harvey Choldin, *Looking for the Last Percent: The Controversy Over the Census Undercounts* (1994); Margo J. Anderson, *The American Census: A Social History* (1988). These efforts have been all the more important since the 1960s with the advent of decennial redistricting requirements,<sup>1</sup> civil rights legislation<sup>2</sup> and the increased use of census figures for economic and social planning and for allocation of federal funds. See generally *Census 2000 Report*, Joint App. 40, 46;

<sup>1</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>2</sup> See, e.g., Voting Rights Act, 42 U.S.C. § 1973 (1994).

National Research Council, *Modernizing the U.S. Census*, National Academy Press, Washington, D.C. 1995 at 24-26, 259-339; Choldin, *supra*, at 26-29; Anderson, *supra*, at 213-14.

For the past several decades, persistent and prominent criticism has been directed at the significant undercount that has marked the decennial census. See Choldin, *supra*, at 1-3, 30-33, 84-118; Anderson, *supra*, at 221-24. Any significant undercount is of concern, but the decennial census undercount is of particular concern because it is dramatically disproportionate among different states, sectors in the society and racial and ethnic groups. This differential undercount thus seriously compromises the values of equal representation and one-person-one-vote. *Census 2000 Report*, Joint App. 49.

From 1940 to 1980 the Census Bureau was able to improve the accuracy of the census each decade. *Census 2000 Report*, Joint App. 40-41. This was achieved in large part by shifting from door-to-door enumerators to mail-out-mail-back procedures whereby households submit their own count, by innovative methods such as the Postal Vacancy Check which uses sample neighboring households to impute the population of units that have been labeled vacant by the Post Office but in fact appear to be occupied, by creative community outreach and response campaigns, and by increased funding and intensified efforts using conventional methods of counting. See *id.*, Joint App. 46-47; see also *Modernizing the U.S. Census* at 19-21, 228-38; Choldin, *supra*, at 65.

By 1990, the efficacy of these methods had reached its limit, and, despite the fact that it "surpassed all previous

censuses in terms of design, execution and resources used, the 1990 census took a large step backwards in terms of accuracy." *Census 2000 Report*, Joint App. 40; see also *id.*, Joint App. 47-52. The census undercount in 1990 was 50 percent greater than the rate in 1980. *Id.*, Joint App. 48. In the 1990 census, children were much more likely to be undercounted than adults, and renters, particularly in rural areas, were more likely to be missed than homeowners. *Id.*, Joint App. 48-49. The 1990 undercount rates were six times larger for African Americans than for non-Hispanic Whites, seven times larger for Hispanics and three times larger for Asians and Pacific Islanders; nearly one out of every eight American Indians living on reservations was not counted. *Id.*, Joint App. 49; *Modernizing the U.S. Census* at 43, note 2; see also 1991 Commerce Decision, 56 Fed. Reg. 33582 (1991).

In California, which has substantial populations of Hispanics, Asians and Pacific Islanders, the 1990 census failed to account for approximately 834,000 people, roughly 2.8 percent of the state's 1990 population compared to a nationwide rate of 1.4 percent. Declaration of Geoffrey Long [filed below with California Legislative Parties' Consolidated Reply in Support of Intervention, April 24, 1998]. As a result, California lost one congressional seat and was forced to bear a disproportionate share of the costs of services because of the loss of millions of dollars in federal funding. *Id.*; *Modernizing the U.S. Census* at 38-40.

Since the 1970s, the Census Bureau and other experts in the field have been working on statistical techniques that could be used to correct the differential undercount.

See, e.g., *Programs to Reduce the Decennial Census Undercount*, Department of Commerce: Report to the House Committee on Post Office and Civil Service by the Comptroller General of the United States, GAO Rep. No. GGD-76-72, at 21-22 (May 5, 1976) ("1976 GAO Report") (reporting efforts in the 1970s); *Wisconsin v. City of New York*, 517 U.S. 1, 10 (1996) (reviewing efforts in the mid-1980s); see also Choldin, *supra*, at 119-33. The Census Bureau's initial plan for the 1990 census included statistical techniques somewhat like those planned for the 2000 census. Choldin, *supra*, at 119-36. Litigation was commenced in 1988 in an attempt to require statistical correction. See *City of New York v. Department of Commerce*, 739 F. Supp. 761 (E.D.N.Y. 1990). Ultimately, the Secretary of Commerce declined to use statistical sampling to correct the undercount on the grounds that, although it would improve the accuracy of the overall count, it would not improve the accuracy of the distributive count among the states, which was more important for apportionment purposes. 1991 Commerce Decision, 56 Fed. Reg. at 33583.<sup>3</sup> This Court unanimously upheld the Secretary's exercise of discretion. *Wisconsin*, 517 U.S. at 19-20.

In response to concerns over the 1990 census undercount, bipartisan legislation was passed by a unanimous Congress and signed by President Bush in 1991, directing the National Academy of Sciences to study the "means by which the Government could achieve the most accurate

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<sup>3</sup> As is discussed below, this concern has been resolved by changes in the statistical sampling procedures planned for the 2000 census.



population count possible." Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, § 2(a)(1), 105 Stat. 635, 635 (1991); see also *Census 2000 Report*, Joint App. 53. The congressional directive included instructions that the National Academy consider "the appropriateness of using sampling methods." Decennial Census Improvement Act of 1991, § 2(b)(1)(C). The National Academy, after extensive study, recommended that what is commonly known as statistical sampling be used in the 2000 census. It concluded that the "[d]ifferential undercount cannot be reduced to acceptable levels at acceptable costs without the use of integrated coverage measurement and the statistical methods associated with it." *Census 2000 Report*, Joint App. 53-55.

Based on the work and recommendations of the National Academy, its own internal studies, recommendations from several advisory committees, public meetings and congressional input, the Census Bureau developed a plan for the 2000 census that included the use of statistical sampling to supplement data obtained through traditional census methods. *Census 2000 Report*, Joint App. 42-43, 56-58. By the time this determination was reached, two important things had become clear. First, unlike the techniques rejected in 1990, the statistical sampling techniques available for the 2000 census will improve both overall and distributive accuracy: "At all geographic levels important to political representation and funds allocation, Census 2000 will provide more accurate results than physical enumeration alone." *Census 2000 Report*, Joint App. 44. Second, no matter how much money and effort are devoted to traditional methods, use

of those methods by themselves, without statistical sampling, cannot improve accuracy. *Modernizing the U.S. Census* at 3; *Census 2000 Report*, Joint App. 42, 49-52, 99, 121-23. As the National Academy Panel on Requirements put it:

It is fruitless to continue trying to count every last person with traditional Census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 Census using traditional methods, as it has in previous Censuses, will not lead to improved coverage or data quality.

*Census 2000 Report*, Joint App. 54.

After it became apparent that the Census Bureau planned to use statistical sampling as part of the 2000 census, an effort by the 105th Congress to prohibit the use of sampling failed when the President vetoed that legislation. Supplemental Appropriations Act, H.R. 1469, 105th Cong. tit. VIII(b)(1) (1997); 33 Weekly Comp. Pres. Docs. 846 (June 9, 1997). Subsequently, legislation was passed that did not include such a prohibition, but that authorized the House of Representatives and other parties to bring litigation testing their argument that pre-existing law or the Constitution already restrained the Census Bureau from using sampling techniques to ensure the accuracy of the census. Appropriations Act of 1998 §§ 209, 210, 111 Stat. at 2480-87. Congress granted original jurisdiction to three judge district courts with direct appellate review to this Court. *Id.* § 209(e)(1), 111 Stat. at 2482.

On February 20, 1998, at the direction of the Speaker of the House, this lawsuit was filed on behalf of plaintiff United States House of Representatives. The complaint

sought a declaration that the use of sampling to determine population for congressional apportionment purposes violates the Census Act, 13 U.S.C. §§ 1-307 (1990), Article I, Section 2, Clause 3 of the United States Constitution and the Fourteenth Amendment. Plaintiff further sought a permanent injunction preventing defendants from using sampling in the apportionment aspect of the 2000 census.

The suit named as defendants the Department of Commerce, the Secretary of Commerce, the Census Bureau and its Director. Members of Congress, the California Legislature and its leadership, certain states and local jurisdictions, as well as certain public interest groups, sought and were granted leave to intervene as defendants. *See Parties to the Proceeding in the Court Below, supra* at ii.

The federal defendants moved to dismiss on grounds of standing, ripeness, justiciability, separation of powers and failure to state a claim for relief. *See Memorandum Opinion* filed August 24, 1998 ("Mem. Opn."), Appendix to Jurisdictional Statement ("Juris. App.") 2a, 11a. The California Legislature and other intervenors filed their own motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the grounds that plaintiff's complaint failed to state a claim on which relief could be granted. *See Mem. Opn., Juris. App. 2a*. Plaintiff moved for summary judgment on the merits of the statutory and constitutional claims. *See Mem. Opn., Juris. App. 2a, 45a-46a*.

On August 24, 1998, the three-judge court filed its opinion, order and judgment denying the defendants' and intervenors' motions to dismiss and granting the

plaintiff's motion for summary judgment. The court ordered "that defendants are permanently enjoined from using any form of statistical sampling, including their program for nonresponse follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment." *Juris. App. 67a*. The court found that the Census Act prohibited the Census Bureau from using sampling and therefore did not find it necessary to reach the constitutional issues.

The federal defendants filed their notice of appeal on August 25, 1998. This Court noted probable jurisdiction in case number 98-404 on September 10, 1998, and, pursuant to a joint motion, ordered expedited briefing and oral argument. The California Legislature filed its notice of appeal on August 28, 1998, filed its Jurisdictional Statement on September 8 in case number 98-413, and filed its motion to consolidate the appeals and for expedited review on September 14, 1998. The California Legislature seeks review in this Court of the district court's ruling on the merits of the challenge to the Secretary's authority. It does not appeal the district court rulings on standing, ripeness, justiciability and separation of powers.

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#### SUMMARY OF THE ARGUMENT

Congress has delegated to the Department of Commerce "virtually unlimited discretion" in conducting the census. *Wisconsin*, 517 U.S. at 19. Under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny, therefore, the Department's reasonable interpretation of the Census Act is entitled to deference unless



Congress has "directly spoken to the precise question at issue" and "unambiguously expressed" a contrary intent. *Chevron*, 467 U.S. at 842-45.

When Congress was considering 1976 amendments to the Census Act it was aware the Bureau of the Census had extensively used sampling techniques in the 1970 census for all purposes, notwithstanding the language of 13 U.S.C. § 195, which provided that "except for the determination of population for apportionment purposes, the Secretary *may*, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' . . . ." Act of Aug. 28, 1957, Pub. L. No. 85-207, sec. 14, § 195, 71 Stat. 481, 484 (1957) (emphasis added).

If Congress found the 1970 use of statistical sampling to improve the population count unacceptable, surely it would have said so. Instead, Congress added the language of section 141(a) explicitly authorizing the Secretary of Commerce to use sampling procedures as part of the decennial census and placing no restrictions on the Secretary's discretion to use those procedures:

The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. . . .

13 U.S.C. § 141(a).

At the same time, Congress raised the stakes with respect to the language of section 195. Where before, in areas other than apportionment the Secretary was

authorized to use sampling "where he deems it appropriate," Act of Aug. 28, 1957, sec. 14, § 195, the new language *required* the Secretary to use sampling if "feasible" in areas other than apportionment. 13 U.S.C. § 195. That change was accomplished by the change from "may where he deems it appropriate" to "shall, if he considers it feasible" in section 195. Thus the two sections are easily harmonized: for all purposes the Secretary *may* use sampling, 13 U.S.C. § 141(a), and the Secretary *must* use sampling at any time that it is "feasible" except for purposes of apportionment. *Id.* § 195. For purposes of apportionment, the Secretary is neither required to nor prohibited from using sampling, but may use it if, as here, he determines that he can do so with the level of confidence that the constitutional command for an "actual enumeration" requires.

Congress could, of course, have used more direct language, but in the absence of an unambiguous message to the contrary the default is that the Secretary has complete discretion to use sampling. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). Where "the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction [particularly when that construction] so closely fits 'the design of the statute as a whole and . . . its object and policy.'" *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417-18 (1993) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)).

Nor does the call in Article I, Section 2, Clause 3 for an "actual enumeration" for apportionment purposes serve to deny the Secretary the discretion to use sampling techniques. Indeed, a review of the history of that section makes it clear that "actual enumeration" was in contrast to the "mere conjecture" and guesswork that were used for the first apportionment. See 1 *The Records of the Federal Convention of 1787*, 578 (Max Farrand ed., rev. ed. 1937). The Secretary's effort to secure the most accurate numbers possible is fully "consistent with the constitutional language and the constitutional goal of equal representation . . . ." *Wisconsin*, 517 U.S. at 19-20 (citation omitted). Just as the Secretary's decision not to adjust in 1990 "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," *id.* at 20, his decision that the state of the art is now such that statistical sampling is the most direct route to the constitutional goal may not be disturbed.

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## ARGUMENT

### I. THE DEPARTMENT OF COMMERCE INTERPRETATION OF THE CENSUS ACT SHOULD BE SUSTAINED

Congress has delegated to the Department of Commerce "virtually unlimited discretion" in conducting the census. *Wisconsin*, 517 U.S. at 19; see also *Franklin v. Massachusetts*, 505 U.S. 788 (1992); 13 U.S.C. § 141(a). Under *Chevron*, and its progeny, therefore, the Department's reasonable interpretation of the Census Act is entitled to deference unless Congress has "directly spoken to the

precise question at issue" and "unambiguously expressed" a contrary intent. 467 U.S. at 842-45; see also *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, \_\_\_ U.S. \_\_\_, 118 S. Ct. 927, 938-39 (1998); *Auer v. Robbins*, \_\_\_ U.S. \_\_\_, 117 S. Ct. 905, 909 (1997); *Smiley v. Citibank*, 517 U.S. 735, 739 (1996); *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 414 (1993); *Rust v. Sullivan*, 500 U.S. 173, 186-90 (1991); *National Labor Relations Bd. v. Iron Workers*, 434 U.S. 335, 350-52 (1990). It has not done so here.

#### A. Congress Has Not Expressed an Unambiguous Intent to Prohibit the Use of Sampling Contemplated Here

At the heart of this controversy are two provisions of the Census Act that address the use of sampling in the decennial census. 13 U.S.C. §§ 141(a) and 195. In 1976, Congress, in a single bill, amended both of these sections in a manner that is the source of contention here. Act of Oct. 17, 1976, Pub. L. No. 94-521, 90 Stat. 2459 (1976). Plaintiff contends that the statute absolutely prohibits the use of sampling to count the population for apportionment purposes. Defendants contend that the statute leaves such use to the discretion of the Secretary of Commerce.

The 1976 amendments to the Census Act, as they related to statistical sampling in the decennial census, did two things: First, section 141(a), which is the statutory authority for the Department of Commerce to conduct the decennial census, was amended by adding new language specifically authorizing the Secretary of Commerce to



take a decennial census "in such form and content as he may determine, including the use of sampling procedures . . ." 13 U.S.C. § 141(a) (emphasis added). At the same time, section 195 was amended to state that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary *shall*, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. § 195 (emphasis added). Prior to the 1976 amendments, section 195 had stated: "Except for the determination of population for apportionment purposes, the Secretary *may*, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." Act of Aug. 28, 1957, sec. 14, § 195, 71 Stat. at 484 (emphasis added).

Other parties to these proceedings will present the argument that the Census Act unequivocally authorizes the use of statistical sampling at issue here. At a minimum, however, these provisions of the Census Act, as amended in 1976, are certainly susceptible to that interpretation. This is evident from the disagreement among the lower courts<sup>4</sup> and among the branches of

<sup>4</sup> The interpretation advanced by the district court in this case is at odds with the views of numerous other courts that have addressed the Department's authority to use statistical sampling. See *City of New York v. Department of Commerce*, 34 F.3d 1114, 1124-25 (2nd Cir. 1994), *rev'd on other grounds*, *Wisconsin v. City of New York*, 517 U.S. 1 (1996); *City of New York v. Department of Commerce*, 739 F. Supp. 761, 767-68 (E.D.N.Y. 1990); *Cuomo v. Baldrige*, 674 F. Supp. 1089, 1096 n.13 (S.D.N.Y. 1987); *Young v.*

government<sup>5</sup> as to the statute's proper interpretation. Cf. *Smiley v. Citibank*, 517 U.S. 735, 739 (1996) (ambiguity evident from dissenting opinions and conflicting rulings in the state courts). That the statute does not unambiguously forbid the use of statistical sampling is further demonstrated by the fact that Congress, without success, attempted to enact legislation in 1997 to prohibit the use of statistical sampling. H.R. 1469, tit. VIII(b)(1). If the Census Act already contained an unambiguously clear prohibition, the legislation would not have been necessary.

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*Klutznick*, 497 F. Supp. 1318, 1334-35 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, *Young v. Baldrige*, 455 U.S. 939 (1982); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D.Pa. 1980).

<sup>5</sup> The litigation position of the House is at odds both with the executive and with previous legislative statements. The executive branch has made its disagreement obvious not only through the Department of Commerce and the Census Bureau but also through an express statement in the President's veto message on H.R. 1469 in the 105th Congress. See 33 Weekly Comp. Pres. Docs. 846 (June 9, 1997). Additionally, the current interpretation of the House appears to be at odds with previous Congressional support for sampling methods. For example, in 1991, a bipartisan Congress directed a study to find ways to make the census more accurate, including the use of sampling. Decennial Census Improvement Act of 1991, §§ 2(a)(1), 2(b)(1)(C), 105 Stat. at 635. This congressional mandate and the time and expense involved in this study makes no sense if the Census Act clearly prohibited the use of sampling.

The absence of a clear congressional prohibition is further evidenced by the historical circumstances in which the 1976 amendments were adopted.

Most significantly, the 1970 census, which was in front of the Congressional oversight committee at the same time as the 1976 amendments to the Census Act, used sampling to improve the count for apportionment purposes and received no criticism at the time.<sup>6</sup> It was during the 1970 census that the Department began using the National Vacancy Check, also known as the Postal Vacancy Check, which became an established part of census procedures and has not been challenged here. *Census 2000 Report*, Joint App. 82; Bureau of the Census, *Effect of Special Procedures to Improve Coverage in the 1970 Census*, PHC(E)-6, at 11-12 (December 1974).<sup>7</sup> The Postal Vacancy Check uses neighboring sample households to

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<sup>6</sup> In *Wisconsin v. City of New York*, this Court found the 1970 sampling was different in kind and much smaller in scale than the sampling considered for the 1990 census. 517 U.S. at 22. Here the significance of the 1970 experience and the continued use since 1970 of the Postal Vacancy Check, which uses sampling to add to the population count, have different implications. The challenge to the Secretary's authority here does not permit distinctions based upon character and scale of sampling. The challenge here is not to some particular form of statistical sampling but to any use of statistical sampling for apportionment purposes. Thus, past use of statistical sampling and its approval by Congress, even on a much smaller scale, cannot be overlooked.

<sup>7</sup> Although plaintiff's interpretation of the Census Act throws the use of the National Vacancy Check in doubt, plaintiff has not challenged that part of the Census 2000 plan. Mem. Opn., Juris. App. 5a.

impute population figures and information about households that have been designated vacant but that seem to be occupied, despite the fact that their inhabitants cannot be located. *Id.*; 1976 GAO Report at 12. The 1970 census also used sampling as part of the post-enumeration check to account for population that the enumerators had missed in sixteen Southern states. *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 15-16; 1976 GAO Report at 12.

These sampling procedures added about 1.5 million people to the 1970 census. See *Census 2000 Report*, Joint App. 82; *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 2, 3; 1976 GAO Report at 12. The Census Bureau concluded that "[w]ithout this program, there would have been a significant deterioration in population coverage from 1960." *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 2.<sup>8</sup>

Between 1970 and 1976, when the Census Act was amended, the use and the effectiveness of sampling for purposes of the decennial census was repeatedly brought to Congress' attention. In 1971, for example, the Report of the Decennial Census Review Committee was submitted to the full Congress and published in the Congressional Record. 117 Cong. Rec. 29722 (Aug. 4, 1971). It summarized census improvement efforts, including the Postal Vacancy Check and the post-enumeration check, *id.* at

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<sup>8</sup> The vacancy check showed that nationally over 11 percent of the units initially assumed to be vacant should have been enumerated as occupied. *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 12; *Census 2000 Report*, Joint App. 82.



29726, and described the conduct of the census in laudatory terms as follows:

Planning and execution of the decennial census is carried on at a commendably high level of technical competence and with proper concern for comprehensiveness, accuracy, and economy. The procedures used have been refined and developed over time through a blend of experience, analytical examination of that experience, and imaginative innovation.

*Id.* at 29723.

The Census Bureau's 1976 report on the procedures used in the 1970 census made no bones about the fact that they included sampling and evaluated their effectiveness as follows:

Evaluation studies . . . show that both steps were very effective in adding persons presumed to have been missed in the enumeration. The vacancy check had the greatest impact on the census count of any measurable coverage improvement program. Both programs are, however, subject to the qualification that they depended on imputation of persons not specifically identified in the field.

Bureau of the Census, *1970 Census of Population and Housing: Procedural History*, PHC(R)-1, at 7-6 (June 1976).<sup>9</sup>

<sup>9</sup> A 1974 Census Bureau Report on the efforts to improve coverage had similarly made it plain that the new procedures involved the use of sampling:

The second type [of improvement program] included a group of projects intended to locate households or

While Congress was considering the 1976 amendments to the Census Act, the Comptroller General submitted a Report to the House Committee on Post Office and Civil Service that again described the use of sampling in the 1970 Census and the improved coverage that resulted. 1976 GAO Report at 21-22. This was the same Congressional Committee that reported on H.R. 11337, the 1976 amendments to the Census Act. See H.R. Rep. No. 94-944 (1976), reprinted in 1976 U.S.C.C.A.N. 5463. Thus, at the time of the 1976 amendments to the Census Act, Congress was fully aware that, notwithstanding the prohibition in 13 U.S.C. § 195 before it was amended, the Bureau of the Census had used sampling to supplement and improve the 1970 census population count. The legislative history reveals no congressional complaints about that practice.

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individuals that were missed in the initial field activities and add them to the census counts. In some of the most important of these projects, sampling was used and, as a result, only estimates of missed persons and housing units could be added to the counts.

Bureau of the Census, *Effect of Special Procedures to Improve Coverage in the 1970 Census* at 1; see also *id.* at 11-16 (describing each program in detail).

The Census Bureau reported that these programs using sampling not only improved overall coverage but also "tended to increase the coverage completeness for those areas and population subgroups for which census coverage had been poorest in the past. Thus, while these procedures did not completely overcome the coverage problems, they tended to decrease the *differentials* in coverage completeness among areas and among population subgroups." *Id.* at 2 (emphasis in original).

If Congress found this use of statistical sampling to improve the population count unacceptable, surely it would have said so. Instead, in the 1976 amendments to the Census Act, Congress added language to section 141(a) explicitly authorizing the Secretary of Commerce to use sampling procedures as part of the decennial census and placing no restrictions on the Secretary's discretion to use those procedures:

The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys.

13 U.S.C. § 141(a).<sup>10</sup>

At the same time, Congress amended section 195. Where before, in areas other than apportionment the Secretary was authorized to use sampling "where he deems it appropriate," Act of Aug. 28, 1957, sec. 14, § 195, the new language *required* the Secretary to use sampling if "feasible" in areas other than apportionment. 13 U.S.C. § 195. That change was accomplished by the change from "may where he deems it appropriate" to "shall, if he considers it feasible" in section 195. Thus the two sections are easily harmonized. The Secretary *may* use sampling for all purposes. The Secretary *must* use sampling at any time that it is "feasible" except in cases of apportionment,

<sup>10</sup> This amendment to section 141(a) meets any possible need for a statement by Congress authorizing the use of sampling. Cf. Mem. Opn., Juris. App. 49a-50a; *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989).

where he or she is neither required to nor prohibited from using sampling.

If, as plaintiff contends, the addition of section 141(a) was not intended to give the Secretary broad authority to use sampling, including its use in apportionment, of what use was it? The amendment to section 195 already not only authorized, but required the Secretary to use sampling where feasible in cases not involving apportionment. As a practical matter that affirmative requirement encompassed the universe of non-apportionment sampling for the Secretary, because one must assume that in fact the Secretary would not exercise his discretion to use sampling at any time if it were not feasible. If section 141(a) does not give the Secretary authority to use sampling for apportionment, it is of no effect and is mere surplusage.<sup>11</sup>

<sup>11</sup> The canons of statutory construction counsel against construing a statute in a manner that renders some of its provisions surplusage. *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (court must construe statute to give effect, if possible, to every provision). The canons of statutory construction also counsel against absurd results. See *Burns v. United States*, 501 U.S. 129, 137 (1991); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring). An interpretation of section 195 that mandates sampling whenever feasible while absolutely forbidding it in the apportionment count would constitute a mandatory two census requirement, one census for apportionment purposes and one for all other purposes. Although two census counts might also be the result of allowing the Secretary not to use sampling for apportionment even when feasible, that result would only obtain if the Secretary, in weighing all of the factors,



Why, however, would Congress give the Secretary more discretion in the sensitive area of apportionment, while requiring sampling in all other cases, where feasible? The answer, it would seem, is that because of the high importance and constitutional significance of apportionment, Congress felt that it was not sufficient that sampling be feasible. Clearly, feasibility of sampling was a necessary condition to its use in apportionment, but not a sufficient condition. In addition to feasibility, the Secretary had to determine that it was indeed sufficiently reliable and indeed sufficiently well accepted to permit its use in apportionment. Congress obviously thought highly of sampling; it permitted it across the board and it mandated it in all cases other than apportionment. But it left to the Secretary the final decision whether or not to use it. In 1990, the Secretary decided not to. For 2000, the Secretary believes that the level of confidence in sampling is now sufficiently high that it can and should be used for apportionment as well.

**B. The Department's Assertion of Its Discretion to Determine Whether to Use Sampling is Not New to This Litigation**

The Department's assertion of its discretion over whether to use sampling to count population in the decennial census has spanned multiple administrations and both major political parties. *Census 2000 Report*, Joint App. 45. The Department has long conducted itself in a

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decided that the reliability was not high enough to justify the use of sampling for apportionment.

manner that assumes discretion over the use of sampling for apportionment purposes, based on the particular needs of the census and the statistical reliability of sampling technology available. See *Census 2000 Report*, Joint App. 81-82 (describing uses of statistical sampling and imputations since the 1940s to count people who could not be individually located).

As early as the 1970s, the Census Bureau was exploring statistical sampling techniques to address the census undercount. 1976 GAO Report at 21-22. And, "[t]hrough the mid-1980's, the Bureau conducted a series of field tests and statistical studies designed to measure the utility of the PES [a statistical sampling technique] as a tool for adjusting the census." *Wisconsin*, 517 U.S. at 10.<sup>12</sup> Thus, contrary to the suggestion by plaintiff and in the opinion below, this litigation does not represent a recent reversal by the Department on the issue of its discretion to use sampling. Rather, for well over a decade the Department has operated on the premise that the Census Act permits statistical sampling for apportionment purposes.<sup>13</sup>

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<sup>12</sup> In the district court proceedings challenging the 1990 census methods the Department entered into a stipulation that left open the possibility of using statistical sampling to correct the 1990 census undercount. See *City of New York v. Dept. of Commerce*, 739 F. Supp. at 764. It was only after studying the circumstances of the census, including the specific statistical methods available and their effect on the census, that the Secretary of Commerce decided not to undertake statistical correction. See 1991 Commerce Decision, 56 Fed. Reg. 33582.

<sup>13</sup> In support of its position, the Department has relied on judicial decisions since the 1980s expressly ruling that the use of statistical sampling is permitted by the Census Act (see footnote

It is true that in justifying the refusal to correct the 1980 census undercount by use of statistical sampling, the Department asserted in litigation, and defended that position in the public record, that the Census Act imposed such a bar.<sup>14</sup> See, e.g., *Carey v. Klutznick*, 508 F. Supp. at 415; 1980 Commerce Decision, 45 Fed. Reg. 69366, 69372 (1980). However, very soon thereafter, as planning for the 1990 census began, the Department reconsidered that position. See *Wisconsin*, 517 U.S. at 10. Although the Secretary of Commerce ultimately vetoed the Census Bureau's preliminary decision to use sampling in the 1990 census, the Secretary stated that "the Bureau would continue its research into the possibility of statistical adjustment of future censuses, . . . ." *Wisconsin*, 517 U.S. at 12; see also 1991 Commerce Decision, 56 Fed. Reg.

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4), as well as formal and informal opinions from the Department of Justice issued over the course of two decades to the same effect. See *Census 2000 Report*, Joint App. 133-38.

<sup>14</sup> That this was a litigation stance is apparent from the statement of Vincent Barabba, Director of the Census Bureau, in his 1980 congressional testimony on Problems with the 1980 Census Count: "We are in the midst of a lawsuit at this point. I have been instructed on advice of counsel not to get into too many details on the discussion of the apportionment and the adjustment relative to it." *Problems with the 1980 Census Count: Joint Hearing Before the Commerce, Consumer, and Monetary Affairs Subcommittee of the Committee on Government Operations and the Census and Population Subcommittee of the Committee on Post Office and Civil Service*, 96th Congress, vol. 23 at 173 (1980).

The fact that this prior agency interpretation was developed in a litigation context gives it less weight and makes it all the more appropriate for the Department to alter its position. See *Smiley v. Citibank*, 517 U.S. at 741; *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212-213 (1988).

at 33584. More important, the Secretary did not assert any statutory prohibition to justify the refusal to use statistical sampling in 1990. Such an interpretation of the Census Act was expressly disavowed in the explanation set forth in the public record.<sup>15</sup> Nor did Congress at that time make any move to suggest that the Census Act denied the Secretary discretion over this policy decision. In *Wisconsin*, the Department stated in its brief to this Court that "[w]e agree . . . that the Constitution and the Census Act do not bar the use of statistical sampling in conducting the decennial census." Brief of Federal Petitioners, *Wisconsin v. City of New York*, 1995 WL 668005, \*26 (1995). The Secretary of Commerce justified the decision not to use statistical sampling to correct the 1990 census as a reasonable exercise of agency discretion, and this Court upheld the decision on that ground. See *Wisconsin*, 517 U.S. at 24; see also 1991 Commerce Decision, 56 Fed. Reg. 33582.

The district court's suggestion that the agency's interpretation is entitled to "less deference" because it constitutes a reversal of position and a litigation strategy (Mem. Opn., Juris. App. 46a-47a n.11) ignores both this history and this Court's previous rulings. "An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue de novo and without regard to

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<sup>15</sup> See, e.g., 1991 Commerce Decision, 56 Fed. Reg. at 33605 (Secretary states that "neither the Constitution nor the relevant statutory provisions are themselves conclusive"); *id.* at 33606 (Secretary explains that "legal considerations did not provide a basis for my decision.").



the administrative understanding of the statutes." *National Labor Relations Bd. v. Iron Workers*, 434 U.S. 335, 351 (1990). The agency's position is "entitled to deference even if it represents a departure from . . . prior policy." *National Labor Relations Bd. v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990); see also *Smiley v. Citibank*, 517 U.S. at 742 ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal" to judicial deference); *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993) ("The Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation."); *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) ("This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question.") (quoting *Chevron*, 467 U.S. at 862). Significantly, in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), this Court deferred to the Census Bureau and Department of Commerce interpretation of the Census Act as permitting them to include overseas federal employees in the decennial census as residents of the "home of record" listed in personnel files, despite the fact that previous policy had excluded such individuals from the census count. 505 U.S. at 793.

As a result of the Census Act's broad grant of autonomy, the Bureau and Secretary have made significant changes to the census through the years with little outside interference. These include sampling, household forms to replace person-by-person forms, self-enumeration (mail-out/mail-back) to replace face-to-face interviews, optical scanning machines to extract data from questionnaires, "hot deck" imputation to assign values

for missing data, extra field checks to reexamine apparent vacant dwellings, and the postal vacancy check established in 1970. *Choldin, supra*, at 236-37. These changes, when instituted, had "equally weighty numerical implications" as the procedures at issue in this case. *Id.* In each instance, the changes were a result of the Bureau perceiving a problem with the accuracy of the census, developing and testing a solution, and then introducing the solution into the census. *Id.* The use of statistical sampling to correct the differential undercount was approached with the same deliberateness. It is entitled to the same deference.

### C. The Department's Interpretation of the Statute is Reasonable

As documented in the district court opinion and in the record herein, the Department of Commerce and the Census Bureau have acted carefully and deliberately in approaching the question of statistical sampling. Indeed, the Department's decision to expand the use of statistical sampling for the 2000 census is based on a much broader consensus among experts, policymakers and politicians than was the case for the Secretary's 1990 decision not to rely on sampling. The Secretary's decision statistically to adjust the initial count in the 2000 census comes after years of study and is anchored in the work and recommendations of the National Academy of Sciences, Census Bureau experts and several advisory committees as well as input from public meetings and members of Congress. *Census 2000 Report*, Joint App. 56-58.

The Secretary's decision not to use statistical sampling to correct the undercount in 1990 was based on his belief that although a statistical adjustment would improve the accuracy of the overall count, it would not improve the accuracy of the distributive count, which was more important for apportionment purposes, and might even "mak[e] the shares less accurate." 1991 Commerce Decision, 56 Fed. Reg. at 33583. See also *Wisconsin*, 517 U.S. at 11, 20-21. This concern has now been resolved by changes in the statistical sampling procedures planned for the 2000 census. See *Census 2000 Report*, Joint App. 87-98. Unlike what was proposed for 1990, in the 2000 census a sample from one state will not be used to count population in another state. *Id.*, Joint App. 94. Thus, not just at the national level but also "[a]t all geographic levels important to political representation and funds allocation, Census 2000 will provide more accurate results than physical enumeration alone." *Census 2000 Report*, Joint App. 44.

The policy considerations surrounding the census undercount reinforce the wisdom of allowing the Department of Commerce discretion in the use of statistical sampling. The social, economic and political problems that result from a persistent and uncorrected undercount are enormous. When that undercount can be corrected, but is not, the integrity and democratic character of our system of representation are, understandably, called into question. That minority groups dramatically and disproportionately bear the burden of the undercount further aggravates the social, political and economic disjuncture.

"The power of an administrative agency to administer a congressionally created . . . program necessarily

requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); see also *Auer v. Robbins*, \_\_\_ U.S. at \_\_\_, 117 S. Ct. at 910; *Department of the Treasury v. Federal Labor Relations Authority*, 494 U.S. 922, 933 (1990). "An initial agency interpretation is not instantly carved in stone" and it is entirely appropriate for the agency to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64.

Finally, Department of Commerce discretion is consistent with, and indeed necessary for, achievement of the fundamental goal of the census: to provide the basis for equal apportionment. There is no question in this case that the goal of the Commerce Department is to use statistical sampling to increase accuracy and that the Secretary of Commerce has reasonably determined that statistical sampling will, in fact, increase accuracy.

It is now apparent that the obstacles are such that no matter how much money and effort are put into traditional counting methods, those methods, standing alone, cannot hope to address the undercount problem.<sup>16</sup> The

<sup>16</sup> *Census 2000 Report*, Joint App. 42, 49-52, 99, 106-07; *Modernizing the U.S. Census* at 3. In the 1990 census, the Census Bureau expanded and improved all the traditional methods and spent more money than ever before. Notwithstanding these extraordinary efforts, the traditional counting methods resulted in census figures that were less accurate than the 1980 census, a census that failed to count 4.7 million people, and a differential undercount that denied California a seat in the House of Representatives and hundreds of millions of dollars in federal funds to which it otherwise would have been entitled.



refinement of the mathematical tools together with the overriding need to address the disparate undercount makes the Department's decision to use statistical sampling in the 2000 Census not only reasonable, but compelling.

This Court's conclusion in *Good Samaritan Hospital* speaks directly to this case:

In the circumstances of this case, where the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction. We should be especially reluctant to reject the agency's current view which, as we see it, so closely fits "the design of the statute as a whole and . . . its object and policy."

*Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417-18 (1993) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)).

## II. THE CONSTITUTION DOES NOT PROHIBIT THE USE OF STATISTICAL SAMPLING

In *Wisconsin v. City of New York*, this Court stated the Constitutional standard that governs this case:

[S]o long as the Secretary's conduct of the census is "consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 505 U.S. at 804, it is within the limits of the Constitution. In light of the Constitution's broad grant of authority to Congress, the Secretary's decision not to adjust need bear only a reasonable relationship to the accomplishment of an actual enumeration of the

population, keeping in mind the constitutional purpose of the census.

517 U.S. at 19-20.

The use of statistical sampling planned by the Secretary of Commerce for the 2000 census is consistent with the language of the Constitution and is demanded by the constitutional goal of equal representation.

The critical constitutional provision is Article I, Section 2, Clause 3, which provides:

Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; . . .

U.S. Const. art. I, § 2, cl. 3.<sup>17</sup>

<sup>17</sup> The three-fifths rule was later superseded by Section 2 of the Fourteenth Amendment. In the proceedings below, plaintiffs argued that the Fourteenth Amendment language that representatives shall be apportioned "counting the whole number of persons in each state, . . ." forbids statistical adjustment of the census. U.S. Const. amend. XIV, § 2. It is

The disputed language is the phrase "actual enumeration." To determine the meaning of that phrase, it is appropriate to look to three sources: the language itself, the historical context in which it was adopted, and the purpose of the provision. Each source supports a construction that allows for the statistical sampling at issue here.

The word "enumeration" is defined in Samuel Johnson's 1773 dictionary as "[t]he act of numbering or counting over; number told out." 1 Samuel Johnson, *A Dictionary of the English Language* (1773). Webster's 1806 dictionary states that "enumeration" means "a numbering or counting over."<sup>18</sup> Noah Webster, *A Compendious Dictionary of the English Language: A Facsimile of the First (1806) Edition* (Crown Publishers 1970). Use of the term "enumeration" elsewhere in the Constitution suggests that it is synonymous with "census." See U.S. Const.

obvious, however, that "whole number of persons" in the Fourteenth Amendment was intended to repeal and replace the three-fifths rule of Article I, Section 2, Clause 3. In this respect, the Fourteenth Amendment, if anything, would demand that the census be corrected, because the differential undercount that results from a traditional census means, as a practical matter, that members of groups protected by the Fourteenth Amendment are counted as less than a whole person.

<sup>18</sup> Both Webster's and Johnson's definition of the term "enumerate" would likewise support an interpretation that allows for the use of statistical sampling. Johnson provides three definitions for the word "enumerate": "To reckon up singly; to count over distinctly; to number." Johnson, *supra*. Webster defines "enumerate" as "to number up, count over, recite." Webster, *supra*. Each dictionary, then, includes the general notion of counting, and the statistical technique at issue here is just that, a form of counting.

art. I, § 9, cl. 4 ("No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."). These formal definitions and usage comport with common sense: to enumerate or conduct an enumeration means to count or ascertain the number. That was still the definition of "enumeration" in 1933, and it is still the definition today.<sup>19</sup>

Similarly, the word "actual" supports an interpretation of the constitution that permits the statistical sampling contemplated here. See Johnson, *supra*. ("Really in act; not merely potential");<sup>20</sup> Webster (1806), *supra* ("really in act, real, certain, positive"). There is no doubt that the Census Bureau's use of statistical sampling to supplement traditional counting methods will be a real ascertainment of population; indeed, all evidence is that it will be a much more accurate count than one based exclusively on traditional methods.

There are various ways to conduct an actual count. One may count singly, in groups, by multiplying, and by the use of statistical techniques such as those at issue here. One may count by personal observation, through hearsay information, and through imputation. For many

<sup>19</sup> See, e.g., 3 *The Oxford English Dictionary* 227 (1933); Webster's *New World Dictionary of American English* (Victoria Neufeldt & David Guralnik eds., 3d ed. 1988).

<sup>20</sup> This is Johnson's second definition. The first, which does not pertain here, is "[t]hat which comprises action." *Id.* The third definition offered is "[i]n act; not purely in speculation." *Id.* Neither of these two alternative definitions is inconsistent with the Department's use of statistical sampling.



years, the decennial count of the population was done by personal observation, with U.S. Marshals or Census Bureau enumerators ascertaining numbers in household groups and in categories by gender and status within the household. Hearsay, however, was used when personal observation was not possible. In the twentieth century, counting by personal observation was replaced by a mail procedure, because the Census Bureau and the Department of Commerce found that mail responses allowed a more accurate count. Now, the Department wishes to use statistical sampling to supplement the traditional procedures and correct for errors that the traditional procedures are known to produce. Each step in this evolution is consistent with the words of the Constitution calling for an "actual enumeration" and with the words of the Constitution expressly stating that the count shall be "in such manner as they [Congress] shall by law direct."<sup>21</sup> U.S. Const., art. I, § 2, cl. 3.

This conclusion is further reinforced when one looks to the history of Article I, Section 2. It is useful to remember that just as a census by U.S. mail was not within anyone's contemplation in the 18th century, neither was statistical sampling. Indeed, nothing at all comparable to statistical sampling existed at that time. Nor were such issues the focus of any of the debates surrounding Article I, Section 2.

<sup>21</sup> That Congress' discretion in this regard is "virtually unlimited" and has been delegated to the Secretary of Commerce was unanimously resolved by this Court in *Wisconsin v. City of New York*, 517 U.S. at 19.

The census requirement was a byproduct of the Great Compromise, which established a bicameral Legislature with equal representation of each state in the Senate and proportional representation in the House of Representatives. It was within the context of this overarching debate that the census requirement was adopted in order to provide a basis for proportional apportionment of representatives among the states.

There was very little direct discussion of the census during the Federal Convention of 1787; rather, to the extent the census was addressed, it was in connection with the rule of representation for the House of Representatives. The discussions occurred at three points: June 11, July 5-13, and August 8, 1787. The debates surrounding this issue are reported in *The Records of the Federal Convention of 1787* ("Records of the Federal Convention"), *supra*. See 1 *Records of the Federal Convention* at 196-208, 524-606; 2 *Records of the Federal Convention* at 221-23. Resolutions and proposals regarding language are also reported in 1 *Records of the Federal Convention* at 193, 227-29 and 2 *Records of the Federal Convention* at 130-31, 178, 182-83, 219, 571, 590-91 and 607-08.<sup>22</sup> The census was also addressed by James Madison in *The Federalist Papers*. *The Federalist* Nos. 54, 58 (James Madison). The history of the Constitution reveals that there were two issues in dispute and that they were resolved as follows.

<sup>22</sup> For a summary of the Convention proceedings relating to the census, see Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 70-74 (1996); see also Declaration of Jack N. Rakove, Joint App. 381-99.

The first issue was whether the rule of representation, and hence the census, was to be based on population or on wealth. See 1 *Records of the Federal Convention* at 205-08, 533-34, 536-37, 540-42, 559-62, 567, 582-88, 591-97. Part of this issue was controversy over whether and how to include the slave population. *Id.* at 205-06, 561, 580-82, 586-88, 592-97, 603-04; see also 2 *Records of the Federal Convention* at 220-23. Ultimately, representation based on population was written into the Constitution. The only compromise in this respect was that slaves, who in other aspects of the law were treated as property, would be treated as people, provided, however, that an individual bound in slavery would be counted as only three-fifths of a person. U.S. Const., art. I, § 2, cl. 3.

The second issue was whether the relative legislative power of the states established by the initial apportionment should or would be locked in. 1 *Records of the Federal Convention* at 534, 558-61, 567, 578-80, 583-86, 599. The backdrop for this debate was the power struggle between large and small states, between northern and southern states and between the Atlantic states and the anticipated new states in the West. See *id.* at 533-34, 536-37, 540-41, 560, 562, 567, 571, 578-79, 583, 601-02, 604-05. The question was should the national Legislature<sup>23</sup> be at liberty regarding whether, how often and on what basis to reapportion, or should periodic reapportionment be required

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<sup>23</sup> Apportionment under the direction of the General Legislature was seen as desirable because the states would not be impartial. 1 *Records of the Federal Convention* at 580.

by the Constitution. *Id.* at 571, 578-79, 581-86.<sup>24</sup> An adjunct of this issue was the question of whether the number of representatives in the first house of the legislature should grow or change. *Id.* at 533-34, 560; see also *The Federalist* Nos. 54, 58 (James Madison). Ultimately, the Constitution fixed a requirement of periodic apportionment to occur every ten years and to be based upon a population formula which counted "the whole number of free persons," excluded "Indians not taxed," and counted slaves as "three-fifths of all other persons." U.S. Const., art. I, § 2, cl. 3. And, the national Legislature was left at liberty to determine the manner in which the census would be conducted. *Id.*

Notably absent from the debates is any discussion whatever regarding how population data was to be collected. Instead, the call for a census stands in juxtaposition to the entirely conjectural numbers that were used for the first apportionment. See 1 *Records of the Federal Convention* at 578 (contrasting "the conjectural ratio which was to prevail in the outset" with "a Revision from time to time according to some permanent & precise standard . . ."); *id.* at 602 (Mr. Elsworth contrasts an "actual census" with the initial apportionment; Mr. Mason "doubted much whether the conjectural rule which was to precede the census, would be as just, as it would be rendered by an actual census."); *id.* at 559 (initial apportionment "did not appear to correspond

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<sup>24</sup> The concern that leaving whether and on what basis to reapportion to the Legislature would work against the interests of the Southern states was also expressed in connection with how slaves would be treated in the calculation. *Id.* at 592-96.



with any rule of numbers, or of any requisition hitherto adopted by Congs."); *id.* at 560 (initial apportionment "little more than a guess."); *id.* at 579 (initial apportionment "a mere conjecture"); *id.* at 586 ("the (temporary) allotment" at the outset gave the Southern states more than the formula for counting free and enslaved persons would have); *see also* *The Federalist* No. 36, at 172 (Alexander Hamilton) (Bantam Classic ed. 1982) (state's share of taxes based on census rather than discretion of the Legislature).<sup>25</sup>

The term "actual enumeration" was introduced by the Committee of Style only in the final week of the Convention and was never discussed. 2 *Records of the Federal Convention* at 590.<sup>26</sup> Throughout the debates, the delegates used the word "census," not the word "enumeration" to describe what they wanted. Census was the term used in motions and votes on motions, 1 *Records of the Federal Convention* at 564, 575, 586, 589, 590, 591, 596, 598, and in the statements of the delegates. *Id.* at 567 (Randolph), 570 (Randolph), 571 (Morris), 579 (Williamson), 580 (Randolph), 583 (Morris), 592 (Pinkney),

<sup>25</sup> Unlike an apportionment based on an actual census, the initial apportionment gave states credit for anticipated future growth in setting their number of representatives. *See, e.g.,* 1 *Records of the Federal Convention* at 561, 568 (Georgia); *id.* at 566, 601 (New Hampshire).

<sup>26</sup> The records of the convention on Article I, Section 9, where the term "enumeration" also appears state that this term is "explanatory" of "census." *See* 2 *Records of the Federal Convention* at 618; *see also* *The Federalist* No. 36, at 172 (Alexander Hamilton) (Bantam Classic ed. 1982) (regarding state's proportional share of taxes, "[a]n actual census or enumeration of the people must furnish the rule; . . .").

594 (Randolph), 595 (Wilson), 600 (Gerry), 602 (Elsworth, Wilson, Mason), 603 (Gerry); *see also* 2 *Records of the Federal Convention* at 131 (resolution of Committee on Detail). This sequence of events and use of language, supports the conclusion that the "actual enumeration" required by Article I, Section 2 simply means an actual census.

Finally, the statistical correction contemplated by the Department of Commerce is not only consistent with but is demanded by the fundamental purpose of Article I, Section 2: subject only to the provision that each state shall have one representative, this constitutional provision calls for apportionment and subsequent redistricting on the basis of one-person-one-vote. *See Karcher v. Daggett*, 462 U.S. 725 (1983); *Wesberry*, 376 U.S. 1. The decision in *Wisconsin* does not vitiate that constitutional command, it merely tempers it with deference to the discretion of the Secretary of Commerce, under the broad delegation of authority from Congress, to decide what will, in fact, enhance census accuracy and hence advance the underlying goal of equal apportionment. 517 U.S. 1.

Here, as in *Wisconsin*, "the Secretary of Commerce, to whom Congress has delegated its constitutional authority over the census," has exercised that authority "in light of the constitutional purpose of the census . . ." 517 U.S. at 24. The only difference is that in *Wisconsin*, the Secretary determined that an "actual enumeration" would best be achieved without the use of the statistical sampling techniques then available, whereas here the Secretary has determined that an "actual enumeration" will best be

achieved by using the much more refined techniques that are now available.

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### CONCLUSION

The judgment below should be reversed.

The Secretary of Commerce should be allowed to provide the several States with the most accurate enumeration that is within his power to achieve.

Dated: October 5, 1998.

Respectfully submitted,

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### APPENDIX

#### Constitutional Provisions and Statutes Involved

U.S. Constitution, art. I, § 2, cl. 3 provides:

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

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U.S. Constitution, art. I, § 9, cl. 4 provides:

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

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U.S. Constitution, Am. XIV, § 2, first sentence provides:

SECTION 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.

U.S. Code, Title 13, § 141 provides:

§ 141. Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan

identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of

App. 4

population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1) If -

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census -

App. 5

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.



U.S. Code, Title 13, § 195 provides:

§ 195. Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

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Pub. L. No. 105-119, 111 Stat. 2440, 2482 (1997), Section 209(e)(1) provides:

(e)(1) Any action brought under this section shall be heard and determined by a district court of three judges in accordance with section 2284 of title 28, United States Code. The chief judge of the United States court of appeals for each circuit shall, to the extent practicable and consistent with the avoidance of unnecessary delay, consolidate, for all purposes, in one district court within that circuit, all actions pending in that circuit under this section. Any party to an action under this section shall be precluded from seeking any consolidation of that action other than is provided in this paragraph. In selecting the district court in which to consolidate such actions, the chief judge shall consider the convenience of the parties and witnesses and efficient conduct of such actions. Any final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the

United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under this section may be issued by a single Justice of the Supreme Court.

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(21)

No. 98-404

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**In the Supreme Court of the United States**  
OCTOBER TERM, 1998

OFFICE OF THE CLERK  
U.S. SUPREME COURT

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
APPELLANTS,  
V.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,  
APPELLEES.

ON APPEAL  
FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR THE UNITED STATES  
HOUSE OF REPRESENTATIVES**

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## STATEMENT

### I. BACKGROUND OF THE CONTROVERSY

Houses of Congress rarely come to court. But this is an extraordinary case. The membership of the House must be reapportioned early in 2001, and the legitimate composition of this institution cannot be determined unless the Department of Commerce conducts a lawful enumeration. See 2 U.S.C. § 2a. The Secretary of Commerce, however, plans to spend \$4 billion on a census that will use statistical sampling to *estimate* the population, even though two three-judge courts have unanimously held that the plan is unlawful. Appellants have announced their intention to ignore these judicial opinions and estimate the population unless this Court reaches the merits and tells them they cannot do so. That is exactly what this Court should do. There is no constitutional bar to judicial relief in these unprecedented circumstances.

1. Appellants seek to justify their decision to use sampling to estimate the population in 2000 based upon concerns that many residents, including a disproportionate number of minorities, will be missed by a headcount. J.A. 48-49, 55. This problem is as old as the Republic. *Every* decennial census since 1790 has resulted in an undercount that affects some groups more than others.<sup>1</sup> Yet, consistent with the constitutional mandate for an actual enumeration and explicit congressional directives, each decennial census since 1790 has been designed to determine the population by counting the people, one by one. See *Wisconsin v. City of New York*, 517 U.S. 1, 6-8 (1996); *infra* at 34-35, 49-50.

While modern transportation has improved coverage in

<sup>1</sup> See, e.g., Bureau of the Census, *A Century of Population Growth* 45 (1909) ("[I]t is reasonable to suppose that many of the households of the pioneers were not enumerated"); Hyman Alterman, *Counting People: The Census in History* 198-200, 262-63 (1969); *Tucker v. United States Dep't of Commerce*, 958 F.2d 1411, 1412 (7th Cir.) (undercount "is concentrated in the poor . . . and among illegal aliens"), *cert. denied*, 506 U.S. 953 (1992).



remote areas, other problems, including deliberate avoidance by "certain segments of the population who have no interest in participating in the census," continue to contribute to the undercount.<sup>2</sup> Despite these difficulties, the 1980 and 1990 censuses are believed to have been the most accurate to date, accounting in net for 98.8% and 98.2% of the population. J.A. 48. Moreover, in absolute terms, the 1990 census was substantially more successful in counting minorities than any but the 1980 census.<sup>3</sup>

2. Although Appellants contend that statistical sampling will improve accuracy, they have acknowledged that the use of sampling "deviate[s] sharply from tradition," J.A. 153, and that, "compared to using counting methods alone," the use of sampling requires "complex, technical calculations and assumptions that will undoubtedly be controversial, even among statisticians."<sup>4</sup> In 1990, the Secretary rejected demands that he use estimates derived from a post-enumeration survey to adjust the headcount, stating that he was unwilling to "abandon a two hundred year tradition of how we actually count people." See United States Dep't of Commerce, *Adjustment of the 1990 Census for Overcounts and Undercounts of Population and Housing, Notice of Final Decision*, 56 Fed. Reg. 33,582 (1991). The Secretary was

<sup>2</sup> *Oversight of the 2000 Census: Review of Census Bureau Planning and Preparations in Response to the Federal Court Ruling that Sampling is Illegal*, Hearing before the Subcomm. on the Census of the House Comm. on Gov't Reform and Oversight, 105th Cong., 2d Sess. 67 (Sept. 9, 1998) ("Oversight Hearing II") (testimony of Acting Director James F. Holmes).

<sup>3</sup> *Compare Report to the House Comm. on Post Office and Civil Service by the Comptroller General of the United States, Programs to Reduce the Decennial Census Undercount* 6 (GGD-76-7 1976) (estimated undercount rate for African Americans was 8% and 7.7% in 1960 and 1970), with J.A. 265 (rate estimated at 4.4% in 1990).

<sup>4</sup> *Status of Planning for the 2000 Census*, Hearing before the Subcomm. on Census, Statistics and Postal Personnel of the House Comm. on Post Office and Civil Service, 103d Cong., 2d Sess. 14 (Jan. 26, 1994).

"deeply concerned" that the use of sampling techniques would "open the door to political tampering with the census," because the techniques "depend[] heavily on assumptions," the results change "in important ways" when the assumptions change, and use of this method could "subject the Census Bureau to partisan pressures." *Id.* at 33,583, 33,605. Given the sensitivity of the apportionment formula, subjective choices among equally defensible statistical mechanisms would have altered the composition of the House. *Id.*<sup>5</sup> This Court affirmed the Secretary's decision. *City of New York*, 517 U.S. at 24.

Unlike the 1990 census, Appellants have deliberately designed the 2000 census to make it impossible for the Secretary, the President, or Congress to opt for an unadjusted headcount after the census has been conducted -- even if they are convinced that the sampling-based estimates are unreliable -- since, under Appellants' plan, sampling will be used in lieu of actual counts for a substantial segment of the population.<sup>6</sup> In prior censuses, the Bureau dispatched an enumerator to obtain information from each household that did not respond to mail questionnaires.<sup>7</sup> This time, enu-

<sup>5</sup> The Secretary cited findings that, of five reasonable alternative adjustment methods, none would have resulted in the same apportionment, and 11 different States would have lost or gained a seat depending on the method chosen. *Id.* at 33,583.

<sup>6</sup> J.A. 158-59. Then-Census Bureau Director Riche declared in 1995 that the Bureau "must produce a 'one-number census' that . . . allows the decennial results to be determined by statisticians at the Census Bureau, not by lawyers and judges." *Oversight of the Census Bureau: Preparations for the 2000 Census*, Hearing before the Subcomm. on Nat'l Security, Int'l Affairs, and Criminal Justice of the House Comm. on Gov't Reform and Oversight, 104th Cong., 1st Sess. 80 (Oct. 25, 1995) (emphasis omitted).

<sup>7</sup> See *City of New York v. United States Dep't of Commerce*, 34 F.3d 1114, 1121 (2d Cir. 1994) (noting that enumerators made as many as six visits to each non-responding household), *rev'd sub nom.*, *Wisconsin v. City of New York*, 517 U.S. 1 (1996). If these efforts failed, the enumerator would obtain information from a neighbor or other reliable source. *Id.*

merators will follow-up on only a random sample of non-responding households – just enough to ensure that, in the aggregate, 90% of the households in each census tract will have been enumerated. The Bureau will make no attempt to contact the remaining 10% (approximately 11.5 million homes), but will instead “infer” the population of these homes based on the results of the sample survey. Appellants do not claim that sampling for non-response follow-up will improve accuracy; they intend to use it to save time and money. J.A. 89, 106-08, 158-59.<sup>8</sup>

Appellants plan to use another form of sampling – integrated coverage measurement (“ICM”) – to estimate the percentage of persons in each racial or ethnic group and geographic area who were likely missed or counted more than once, based on a survey of approximately 0.6% of the households in the nation. See J.A. 58, 93 (ICM will survey approximately 750,000 of the estimated 118 million U.S. households). The resulting adjustment factors will be used to alter the population numbers for every geographic area in the country. J.A. 92-98, 142.<sup>9</sup> The ICM is *not* a recount. Hundreds of thousands of people will be deleted from the census totals, and millions of imagined people who were never identified will be added, based on Appellants’ presumption that all individuals with selected traits (*e.g.*, all young female, city-dwelling, African-American renters) are equally likely to participate in the census. J.A. 97.

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As a last resort, the Commission has imputed information for households known to be occupied from data on nearby units. See *infra* note 69.

<sup>8</sup> The GAO has concluded that sampling for non-response follow-up will be *less accurate* than a complete enumeration. Report to the Ranking Minority Member, (Senate) Comm. on Governmental Affairs, *2000 Census: Progress Made on Design, but Risks Remain* 26 (July 1997).

<sup>9</sup> Appellants will also use sampling to determine the number of persons living in housing units mistakenly identified by the Postal Service as vacant. J.A. 87-88. The House observed below that this use of sampling has the same legal infirmities as sampling for non-response follow-up. Docket Entry (“D.E.”) 19, at 18 n.13.

3. Appellants were aware that the decision to proceed with this plan without clear congressional authorization put the 2000 census in legal jeopardy, because they had previously interpreted 13 U.S.C. § 195 and the Constitution to bar the use of sampling for apportionment. See *infra* at 24-27, 31 n.42, 39 n.53. They nevertheless vowed to proceed without regard to the serious harm that the unlawful use of sampling will cause: the House will not have the information needed to lawfully reapportion its membership, and a \$4 billion investment in the census will be wasted. If the census were declared unlawful after the fact, the “only recourse would be to re-conduct the census, even though doing so would come too late for the House to fulfill its duties to oversee a constitutional census every decade.” J.S. App. 38a.

Congress, for its part, made exhaustive legislative efforts to compel Appellants to abandon their plan to use estimates in lieu of an actual enumeration. On June 5, 1997, Congress passed a bill that expressly reaffirmed the historical prohibition against sampling. H.R. 1469, Title VIII, 105th Cong., 1st Sess. (1997) (“Section 195 . . . states that sampling cannot be used for purposes of apportionment”). President Clinton vetoed this legislation, even though it included billions of dollars in disaster relief that the President described as “urgent[ly] need[ed],” because, among other things, it would have “permanently prohibit[ed] the Department of Commerce from using statistical sampling techniques in the 2000 decennial census for the purpose of apportion[ment].” H.R. Doc. No. 105-96, at 2 (1997).

Congress tried again. The House passed its 1998 appropriations bill for the Departments of Commerce, Justice, State and the Judiciary (which are traditionally funded in a single bill) subject to the condition that Appellants could not use the funds to design or conduct a census that used sampling to determine the population for purposes of apportionment. H.R. 2267, 105th Cong., 1st Sess. (July 25, 1997); H.R. Rep. No. 105-207 (1997). When the President asserted



that he would veto the legislation — with the attendant shutdown of census planning and major departments of government — a compromise was reached. Section 209(b) of the 1998 Appropriations Act, which was signed by the President, authorized “[a]ny person aggrieved” to obtain expedited judicial review of the Secretary’s decision to use sampling, based upon Congress’s finding that “the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census.” See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(a)(7), 111 Stat. 2440, 2441 (1997) (“1998 Appropriations Act”). Congress further found that the House of Representatives is a party aggrieved by Appellants’ program to use statistical sampling for purposes of apportionment (§ 209(d), 111 Stat. at 2482), and authorized it to sue for declaratory and injunctive relief, § 209(b), 111 Stat. at 2481.

The House of Representatives filed this action in the United States District Court for the District of Columbia because it had no other means to protect its interests, and time had run out. Unless this Court invalidates Appellants’ plan to use sampling by early next year, the House will not receive the results of a lawful enumeration by January 2001, as required by 2 U.S.C. § 2a, and Representatives will not be apportioned in accordance with the results of an enumeration in time for the 2002 elections.<sup>10</sup>

## II. THE DECISION OF THE DISTRICT COURT

The three-judge district court unanimously denied Appellants’ motion to dismiss the complaint for lack of jurisdic-

<sup>10</sup> See, e.g., *Oversight of the 2000 Census: Putting the Dress Rehearsals in Perspective*, Hearing before the Subcomm. on the Census of the House Comm. on Gov’t Reform and Oversight, 105th Cong., 2d Sess. 84 (Mar. 26, 1998) (“*Oversight Hearing I*”) (concluding that the census will “truly be imperiled” if the issue is not resolved by March 1999).

tion, and granted the House’s motion for summary judgment. With respect to standing, the court held that the “inability to receive information which a person is entitled to by statute” is a cognizable injury; the House is entitled to a statement from the President “showing the whole number of persons in each State . . . as ascertained under the . . . decennial census” (2 U.S.C. § 2a(a)); and, if statistical sampling is unlawful or unconstitutional, “Congress will not receive information that it is entitled to receive by law.” J.S. App. 17a. The court explained that it is well established that a House of Congress suffers a legally cognizable injury when it is deprived of information that it needs in aid of its legislative functions or “in conjunction with its power to judge the elections, returns and qualifications of its members,” and found “no principled basis on which to conclude that the House is not similarly (if not *a fortiori*) injured when it cannot obtain information necessary to perform its constitutional apportionment function.” J.S. App. 19a, 20a.

The court also concluded that the House had standing because Appellants’ plan for the 2000 census threatens the House’s institutional interest in its lawful composition. J.S. App. 16a, 20a-22a (citing *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187 (1972)). The court observed that, if judicial review were deferred, and the courts were to “invalidate the census in 2001 or anytime thereafter, the ‘one-number’ census method would require the entire enumeration to be re-conducted at a cost of \$4 billion, and, more importantly, the new census would not be completed before the date that Congress is supposed to perform its constitutional duty regarding apportionment.” J.S. App. 24a.

On the merits, the court held that Appellants’ plan to use statistical sampling techniques to determine the population for purposes of apportionment violates the Census Act, 13 U.S.C. § 195. J.S. App. 46a-64a. The court observed that before 1976 the proviso in § 195 unquestionably prohibited the use of sampling for apportionment purposes, and the

court rejected Appellants' argument that Congress repealed the prohibition on sampling by modifying the portion of § 195 that governed the Secretary's authority to use sampling for non-apportionment purposes and rewording § 141(a) to include a generalized reference to sampling. The court concluded that the ordinary reading of the apportionment proviso in § 195, even after Congress changed it to mandate (and not just authorize) the use of sampling for non-apportionment purposes, was inconsistent with Appellants' interpretation because an exception from a command "often . . . represents a prohibition against doing" the action covered by the exception. J.S. App. 52a. That meaning was especially appropriate here because "[w]e have a prior understanding" – based on 200 years of history and the critical constitutional and political importance of the apportionment – that renders it highly unlikely that Congress would bestow such discretion on the Secretary casually, without making that intention clear in the text. *Id.* at 53a. The court also found a "striking[] absen[ce]" of any legislative history supporting Appellants' view that Congress intended to repeal the prohibition on sampling for apportionment purposes and provide Appellants with unfettered discretion on whether and how to use sampling for "the only constitutional aspect of the census." *Id.* at 53a, 62a.

#### SUMMARY OF ARGUMENT

In *City of New York*, this Court upheld the Secretary's decision to disregard statistical estimates of the population and use an unadjusted headcount as the basis for the 1990 census. The Court concluded that the government may legitimately narrow "the potentially divisive and complex issues associated with apportionment" by adhering to "procedural and substantive rules that are consistently applied year after year." 517 U.S. at 21. Just one year later, the Secretary unilaterally declared that he has the statutory and constitutional authority to abandon the rule against statistical sampling that has governed the census process

throughout our nation's history. This Court reserved both the statutory and constitutional questions in *City of New York*, 517 U.S. at 19 nn. 9, 11. It should now affirm the unanimous judgment of the district court.

I. The sole constitutional purpose of the census is the apportionment of the House of Representatives. Yet, Appellants contend that the House has no institutional stake in the manner in which the census is taken. They also suggest that the federal courts can never provide redress in cases and controversies between the political branches. These arguments conflict sharply with this Court's precedents.

A. It is settled that a person suffers a cognizable injury when deprived of information to which he is entitled by statute, and well recognized that Congress suffers a redressable injury when deprived of information pertinent to its official functions. Based on these principles, the district court correctly held that the House will suffer a cognizable injury if it is deprived of information – the results of an actual enumeration – to which it is entitled by statute and which it needs when considering whether to enact legislation affecting the method of apportionment and in determining the qualification of its Members. Appellants' speculation that Congress might in the future enact sham informational requirements to afford itself standing to challenge the Executive's enforcement of laws affecting the general welfare is no warrant to deny the House's standing in this case. Experience demonstrates that the courts are fully capable of distinguishing demands for information relevant to Congress's constitutional functions from disclosures compelled by Congress to achieve illegitimate ends.

B. The district court faithfully applied this Court's precedents when it concluded that the House has a concrete, institutional interest in its lawful composition. Appellants protest that the House will have 435 Members even if unlawfully composed. The integrity of the House, however, would



be harmed even more fundamentally by a misallocation of its seats than by an increase or decrease in their number.

C. The Court has relied on the strict application of Article III standing requirements to confine the judiciary within its rightful sphere and safeguard the separation of powers. The House's interests here are amply concrete and particular to satisfy Article III, and the suit presents purely legal issues of the type which federal courts traditionally resolve. According to Appellants, no private party has standing to prevent the injuries threatened by their unlawful plan for the 2000 census. The Constitution does not forbid Congress from authorizing judicial redress in these circumstances.

II. When Congress amended the Census Act in 1976, it confirmed in 13 U.S.C. § 141(a) that the Secretary has authority generally to "use . . . sampling procedures" when conducting "the decennial census." The rules governing how the Secretary may use sampling are set forth in a different section, 13 U.S.C. § 195. It states that the Secretary shall use sampling to carry out his statutory duties to the extent feasible, "except for the determination of population for purposes of apportionment of Representatives in Congress." The proviso in § 195 prohibits the use of sampling for purposes of apportionment. That has been the unmistakable function of the proviso since it was adopted in 1957.

It defies common sense – and the controlling canons of construction – to suggest (as Appellants do) that Congress impliedly repealed this fundamental limitation on the Secretary's authority in 1976 by modifying the Secretary's authority to use sampling for other purposes, without a plain statement in the statute, without changing the language of the proviso, without any debate or mention in the legislative record, and without providing any standards to guide the use of statistical techniques to prevent "political tampering with the census." 56 Fed. Reg. at 33,582, 33,583 (statement of the Secretary). Congress has never given the Secretary the authority he claims today.

III. The use of statistical constructs to estimate the population for apportionment purposes is also forbidden by the Constitution, which demands an "actual Enumeration." That term had a plain meaning at the time of the ratification which excluded estimation. As Samuel Johnson instructed in 1773, to "enumerate" was to "reckon up singly." *A Dictionary of the English Language* (4th ed.).

The Framers understood the difference between counting and estimating. If they had intended to permit whichever method was thought most accurate at the time, they would have used open-ended language. The Framers' concerns, however, went beyond accuracy. They inscribed permanent and precise standards to shield the census from political manipulation. Estimating the population through statistical sampling would undermine that goal, necessitating numerous choices about demographics and methodology that can be influenced by political considerations.

History forecloses Appellants' claim that they should be permitted to rely upon statistical sampling whenever they think that it might produce a more accurate result. It has never been so. The census of 1790 only included people who could be located and identified by family name on the census rolls, even though Thomas Jefferson, who directed it, was familiar with estimation and understood that the headcount resulted in a substantial undercount of the people who were hardest to find. For 200 years, Congress has echoed the plain meaning of the text, requiring those entrusted with the census to count, not estimate, the people.

## ARGUMENT

### I. THE HOUSE HAS STANDING IN THIS CASE

Congress established a specific cause of action for all aggrieved persons, including the House of Representatives; eliminated any prudential barriers to suit; and provided for expedited judicial proceedings with a direct appeal to this Court because it believes that this dispute must be resolved in time to ensure a lawful census and valid reapportionment.

The district court correctly found that Appellants' plan to estimate the population instead of counting it threatens the House's concrete interests in obtaining information to which it is entitled by statute and ensuring its own lawful composition, and that judicial resolution of this legal dispute would neither give rise to a doctrine of general legislative standing nor otherwise offend the separation of powers.<sup>11</sup> This Court should affirm the district court's judgment.

**A. The House Has A Cognizable Interest In Receiving The Information To Which It Is Entitled Under 2 U.S.C. § 2a**

It is well established that the inability to receive information to which a person is entitled by law is a sufficiently concrete and particular injury to satisfy constitutional standing requirements. *FEC v. Akins*, 118 S. Ct. 1777, 1784 (1998); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449 (1989). It is equally well established that a House of Congress has the constitutional power to subpoena the production of information it needs to perform its official functions, and to enforce its subpoenas, when necessary, by fining or imprisoning contumacious witnesses.<sup>12</sup> The district

<sup>11</sup> Appellants observe (Br. 21 n.9) that Congress has not yet appropriated the funds necessary for the Commerce Department to complete the 2000 census, but they no longer assert that the possibility that Congress might withhold appropriations renders this case unripe. If the House were to postpone funding the census, there is no reason to believe that Appellants would recant their commitment to use sampling. Rather than producing a census with population figures derived from an actual enumeration, this tactic might well ensure that for the first time in the nation's history, no decennial census is conducted at all. *See Oversight Hearing II* at 86. The House would suffer harm either way.

<sup>12</sup> *See McGrain v. Daugherty*, 273 U.S. 135, 175 (1927) (Senate may arrest witness who refuses to comply with subpoena for information pertinent to its investigation of Attorney General's execution of the antitrust laws); *see also Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929) (Senate may imprison individual who refuses to provide information pertinent to Senate's determination whether a Senator-elect meets the constitutional specifications for membership); *see also Buckley v. Valeo*, 424 U.S. 1, 137-38 (1976).

court correctly concluded that Congress may authorize the House instead to compel by civil suit the production of information to which the House is entitled by law, and which it needs to perform express constitutional duties.

The Census Clause imposes on Congress a unique and specific obligation to ensure that an "actual Enumeration" is taken every ten years for purposes of apportionment. Pursuant to this constitutional mandate, Congress enacted 2 U.S.C. § 2a, which requires the President to transmit to Congress a statement showing (1) "the whole number of persons in each state ... as ascertained under the ... decennial census," and (2) "the number of Representatives to which each state would be entitled" under the method of equal proportions. The House relies on these numbers to perform its duties respecting apportionment and, as "Judge of the Elections, Returns and Qualifications of its own Members" (U.S. Const. Art. I, § 5, cl. 1), to determine the size of the delegation that it will seat from each of the States.<sup>13</sup> Because the House needs the numbers from an actual enumeration to perform its constitutional duties, its inability to receive those numbers constitutes a cognizable injury. *Cf. Ingalls Shipbuilding v. Director, Office of Workers' Comp. Programs*, 117 S. Ct. 796, 805 (1997).

Appellants do not dispute that a House of Congress may "seek[] judicial redress in aid of its legislative functions." *See* D.E. 20, at 40 n.21 (citing 2 U.S.C. § 288b(b)); *Raines v. Byrd*, 117 S.2312, 2323 n.2 (1997) (Souter J., concurring).<sup>14</sup>

<sup>13</sup> For example, in 1870, the House determined based on the 1860 census that a Representative-elect from Virginia could not be seated, since three of Virginia's seats had been transferred to the new State of West Virginia. *See 1 Hinds' Precedents of the United States House of Representatives* § 318, at 194-97 (1907). The House also rejected Representatives-elect from Tennessee and California when seating them would have increased their States' representation in Congress beyond the number established by the apportionment. *See id.* §§ 314-16, at 182-90.

<sup>14</sup> *See also Response to Cong. Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 U.S. Op. Off. Legal



They argue that the House should not be afforded judicial redress in *this* case because (according to Appellants) (1) the House does not need the results of a lawfully conducted census to perform its constitutional apportionment function (Br. 19-20); and (2) if this Court recognizes the House's standing to enforce its statutory right to information, Congress will be able, by passing informational legislation, to vest in itself a "cognizable stake and substantial role in the execution of the laws," *id.* at 19. Neither argument has merit.

For much of this nation's history, the Executive reported the results of the actual enumeration to Congress, which then enacted specific legislation prescribing the number of Representatives to which each State was entitled.<sup>15</sup> This system broke down when Congress proved unable to reapportion the House based on the 1920 census. In the aftermath of that historic failure, Congress created a default mechanism under which the President would calculate the apportionment using a prescribed formula, and his calculation would have effect if Congress "fail[ed] to enact a law apportioning Representatives among the several States." Act of June 18, 1929, ch. 28, § 22(b), 46 Stat. 21, 26-27.

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Counsel 68, 87-88 & n.33 (1986) (separation of powers does not prohibit a House of Congress from enforcing subpoena against an Executive official in court).

<sup>15</sup> See Act of Apr. 14, 1792, ch. 23, 1 Stat. 253; Act of Jan. 14, 1802, ch. 1, 2 Stat. 128; Act of Dec. 21, 1811, ch. 9, 2 Stat. 669. The census acts governing the 1820 through 1870 censuses explicitly required the Executive to send the results of the enumeration to Congress. Act of Mar. 14, 1820, ch. 24, § 12, 3 Stat. 548, 553; Act of Mar. 23, 1830, ch. 40, § 11, 4 Stat. 383, 387; Act of Mar. 3, 1839, ch. 80, § 11, 5 Stat. 331, 336; Act of May 23, 1850, ch. 11, § 19, 9 Stat. 428, 431-32. (The 1860 and 1870 censuses were conducted under the 1850 Census Act, which provided for automatic apportionment of the House of Representatives.) Although the 1880 through 1910 census acts did not include this requirement, Congress unquestionably used the results of those censuses to apportion the House. Act of Feb. 25, 1882, ch. 20, 22 Stat. 5, 6; Act of Feb. 7, 1891, ch. 116, 26 Stat. 735, 736; Act of Jan. 16, 1901, ch. 93, 31 Stat. 733, 734; Act of Aug. 8, 1911, ch. 5, 37 Stat. 13.

The current Census Act retains Congress's prerogative to alter the apportionment formula. See 2 U.S.C. § 2a(a), (b) (President's report specifies the number of Representatives to which each State "would be entitled" unless Congress changes the apportionment formula "by subsequent statute") (emphasis added). Thus, contrary to Appellants' argument, Congress has fully preserved its "right and responsibility . . . to translate the current census into a new apportionment on whatever basis it pleases." S. Rep. No. 71-2, at 3 (1929) (emphasis added); see also 71 Cong. Rec. 1610-11 (1929) (statement of Sen. Vandenberg).

The historical record confirms Congress's continuing need for lawfully gathered, state-level population figures. Congress adopted the current equal proportions method of apportionment for the 1942 reapportionment *after* receiving the results of the 1940 census. Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761-62; see *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 464 & n.42 (1992). In 1981, as well, *after* receiving the President's statement, the House considered replacing the current method with the Hamilton-Vinton method, which would have shifted seats from New Mexico and Montana to California and Indiana. *Census Activities and the Decennial Census, Hearing before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 97th Cong., 1st Sess. 19 (June 11, 1981). As this Court has recognized, "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain*, 273 U.S. at 175.

Contrary to Appellants' suggestion (Br. 18), the President cannot satisfy the House's need for information by certifying a sample census to be the "decennial census of population." It is the numbers determined through a lawful enumeration — not any old numbers — that Congress requires when it considers whether to alter the method of apportion-

ment and decides who may lawfully take a seat in its chamber. Sampling will produce the wrong information and, as the district court found, Congress's "receipt of the wrong information is no less of an injury than failure to receive any information at all." J.S. App. 18a.<sup>16</sup>

It is well recognized that a House of Congress can sue to enforce a right to information it has sought by subpoena.<sup>17</sup> Appellants argue (Br. 19), however, that a House of Congress cannot be permitted to sue Executive officials to enforce a right to information that Congress has demanded by statute,<sup>18</sup> because that would enable Congress to "give itself a cognizable interest in the outcome of *any* Executive

<sup>16</sup> Appellants' unlawful program for the 2000 census has put the House "in the position of having to choose" between agreeing to the use of sampling, which it "believ[es] . . . to be unconstitutional," and failing to take the actions necessary to ensure that a census and reapportionment will be timely effectuated. Cf. *Board of Educ. v. Allen*, 392 U.S. 236, 241 (1968) (board had standing where its members were forced to choose between violating their oath to uphold the Constitution by loaning textbooks to parochial schools and violating the statute and suffering associated economic harm).

<sup>17</sup> See 2 U.S.C. § 288d(a) (authorizing Senate to bring judicial proceedings to enforce subpoenas); *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) (finding it "clear that the House as a whole ha[d] standing" to defend subpoena for information over which the Executive asserted control); see also *In re Application of U.S. Senate Permanent Subcomm. on Investigations*, 655 F.2d 1232 (D.C. Cir. 1981) (suit by Senate, under 2 U.S.C. § 288b, to enforce subpoena for testimony on organized crime), *cert. denied*, 454 U.S. 1084 (1981); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 727 & n.3 (D.C. Cir. 1974) (suit by Senate Committee to enforce subpoenas under special jurisdictional statute).

<sup>18</sup> It is settled that Congress can impose statutory reporting requirements on the Executive. See *INS v. Chadha*, 462 U.S. 919, 955 n.19 (1986); *Office and Duties of Att'y Gen.*, 6 Op. Att'y Gen. 326, 344 (1854) ("Congress may at all times call on [the heads of executive departments] for information or explanation in matters of official duty"); *Duties of the Att'y Gen.*, 1 Op. Att'y Gen. 335, 336 (1820) (Congress may by legislation require Attorney General to prepare report on claims made against the United States).

Branch decision, simply by requiring executive officials to report that decision to Congress."

Contrary to Appellants' suggestion, no floodgates will open if this Court concludes that the House has standing to seek judicial redress in this case. The House has a cognizable interest in the Executive's lawful conduct in this extraordinary case because the sole purpose of the conduct, by constitutional and statutory design, is to collect information that the House needs to receive in time to perform its own explicit constitutional obligations. The speculative possibility that Congress might enact sham informational requirements in a bid to afford itself broad standing to challenge the lawfulness of Executive conduct is no warrant to deny the House's standing here. The basis of Congress's authority to compel the disclosure of information is necessity, *Marshall v. Gordon*, 243 U.S. 521, 541-43 (1917), and this Court has proven fully capable of discriminating between legitimate and illegitimate invocations of that authority in cases involving Congress's exercise of its inherent contempt power and in criminal prosecutions for contempt of Congress.<sup>19</sup> The Court is equally capable of delimiting, with attention to necessity and established Article III standing requirements, Congress's authority to invoke civil process to obtain information it demands by law.

Appellants' fear of legislative overreaching, moreover, is greatly exaggerated. Congress has long enjoyed the power

<sup>19</sup> See, e.g., *Kilbourne v. Thompson*, 103 U.S. 168 (1881) (House exceeded its authority when it imprisoned contumacious witness, because its underlying inquiry into the private affairs of individuals was "one in respect to which no valid legislation could be enacted"); *Watkins v. United States*, 354 U.S. 178 (1957) (reversing conviction for contempt of Congress, because House Committee on Un-American Activities did not establish that questions were based on a legitimate subject of legislative inquiry); cf. *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 476-78 (1977) (distinguishing Bill of Attainder from non-punitive legislation by examining whether Congress had "legitimate justifications" for enacting the law and whether "legislative record" indicated an intent to punish).



of arrest to obtain information relevant to an investigation of the Executive Branch (see *McGrain*) or to a determination of a Member's qualification for office (see *Barry*), yet Congress has not exercised this power in over half a century. Congress ordinarily has no need to exercise self-help or afford itself a cause of action to constrain Executive conduct. Congress exercises continuing oversight, and provision of a cause of action to aggrieved private parties (with attorneys' fees and costs, if need be) effectively ensures judicial challenges to unlawful agency action. This is ordinarily true even with respect to the Executive's information-gathering obligations. See, e.g., *Akins*.<sup>20</sup>

#### B. The House Has A Cognizable Interest In Its Lawful Composition

In *Beens*, this Court held that a legislature's interest in matters that "directly affect" its lawful composition is amply personal and concrete to afford it standing under Article III. A three-judge district court had reapportioned the legislative districts of the Minnesota State Senate by, among other things, reducing the number of senatorial districts. The State Senate, which had intervened in the district court, challenged the reapportionment plan on appeal. 406 U.S. at 192. This Court concluded that the State Senate was "an appropriate legal entity for purpose of intervention and, as a consequence, of an appeal" because it was "directly affected by the District Court's orders." *Id.* at 194. The district court correctly found that the House of Representatives'

<sup>20</sup> In *Akins*, voters claimed that the FEC's determination that the American Israel Public Affairs Committee ("AIPAC") was not a "political committee," subject to the disclosure requirements of 2 U.S.C. § 431, deprived them of information which would help them evaluate candidates for public office. 118 S. Ct. at 1784. This Court found that the voters' allegations that the FEC had violated the law by refusing to acquire this information from AIPAC stated a cognizable informational injury under Article III. *Id.* So too here.

institutional interest in being lawfully composed similarly is "directly affected" by Appellants' sampling plan.

Appellants insist that *Beens* is inapposite because, while sampling may affect the distribution of seats in the House, it will "have no effect on the *number* of Representatives that will convene in the 108th or any subsequent Congress." Br. 22-23 (emphasis added). Appellants cannot explain why it is more injurious to have the wrong number of seats than to have the wrong allocation of seats.<sup>21</sup> If anything, "preserv[ing] the constitutional character" of the House by ensuring that it is not "elected out of an anticonstitutional source" is a more fundamental interest than fulfilling the statutory requirement that the House have 435 Members. S. Rep. No. 71-2, at 3. Appellants' attempt to distinguish *Beens* on this ground cannot withstand scrutiny.<sup>22</sup>

Appellants also protest (Br. 23) that the challenge in this case concerns the lawful apportionment of Representatives in a *future* Congress. Their suggestion that the presently constituted House is an improper plaintiff is incorrect for two reasons. First, while the House is not viewed as a continuing body for *all* purposes, see, e.g., *Gojack v. United States*, 384 U.S. 702, 706 n.4 (1966), the Constitution speaks

<sup>21</sup> Indeed, one of the purposes served by the actual enumeration requirement is to protect against political manipulation of the apportionment. See 56 Fed. Reg. at 33,583 (finding by Secretary that use of sampling to adjust the census numbers would "open the door to political tampering"); *id.* at 33,600-03; accord H.R. Rep. No. 104-821, at 4-11 (1996). No amount of oversight would provide the House with the same protection. The House has a strong institutional interest in the enforcement of this prophylactic rule. Cf. *Meese v. Keene*, 481 U.S. 465, 475 (1987) (the need to take affirmative steps to avoid risk of harm constitutes injury-in-fact).

<sup>22</sup> The Court rejected this distinction in *Beens* itself, when it drew support from *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964) (per curiam), *aff'd mem.*, 381 U.S. 415 (1965), which, like this case, involved solely a change in composition. Although Appellants correctly observe (Br. 23 n.11) that the State Senate in *Silver* was ordered to enact legislation to change its apportionment, the Court in *Beens* did not refer to that aspect of the State Senate's legal injury.

of the "House of Representatives" as an institution, not just a fleeting succession of Congresses, and the institution is in many respects a continuing juridical entity.<sup>23</sup> As the district court observed, statutory provisions make clear that certain functions, such as the ownership of property, transcend the seating of a new Congress. J.S. App. 23a (citing 2 U.S.C. § 112e(b)). The 1998 Appropriations Act similarly extends a cause of action to the House, not to a particular Congress. Nothing in the Constitution prohibits Congress from extending that institutional authorization.

Even if the House were not a continuing institution for these purposes, however, the district court correctly concluded that nothing in the Constitution prevents Congress from authorizing the 105th Congress to represent the institutional interests of its successors, where, as here, complete relief cannot be obtained after the census is taken.<sup>24</sup> See J.S. App. 23a-26a (discussing third-party standing cases involving next friends and fiduciaries). Appellants' contention (Br. 25 n.12) that future Congresses may view the use of sampling differently has no weight. There is never complete assurance that a representative is pursuing the true preferences of a real party-in-interest that lacks the capacity to act on its own behalf, and the law requires no such assurance. See *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) ("next

<sup>23</sup> See *Powell v. McCormack*, 395 U.S. 486, 497-500 (1969) (in a mandamus action for payment of withheld salary brought by a Representative who alleged that he was unconstitutionally denied a seat in the 90th Congress, a live controversy existed even though the 90th Congress had terminated at the time of this Court's review).

<sup>24</sup> There is unquestionably a serious risk that the use of sampling will eventually be invalidated. Because Appellants intend to take a "one-number" census, the only remedy for an unlawful census would be to take a new census, which would necessitate a special mid-decade reapportionment. Congress has a concrete interest in Appellants' use of time-tested census procedures that avoid the risk of such disruption. Cf. *Reynolds v. Sims*, 377 U.S. 533, 583 (1964) (limits "on frequency of reapportionment are justified by need for stability and continuity in the organization of the legislative system").

friend" must explain "why the real party in interest cannot appear on his own behalf," and must be "truly dedicated to the best interests of th[at] person"). Congress was surely within its constitutional authority in presuming that successor Congresses will share the interest of the current body in being lawfully composed (and in receiving information critical to the performance of its constitutional duties).

Finally, Appellants stress that, in contrast to *Beens*, this case "was filed by a federal legislative entity," which has no "capacity to sue in order to vindicate the general public and governmental interest in the execution of the laws." Br. 23. In *Beens*, however, the State Senate had standing in its own right because it was "directly affected" by the district court's reapportionment orders. 406 U.S. at 194. The House has the same concrete institutional interest in matters affecting its composition. See *Powell*, 395 U.S. at 520-21, 548.

#### C. Congress Did Not Violate The Separation Of Powers By Authorizing This Action

Appellants argue that, even if the House has alleged imminent injury to its concrete, particularized institutional interests, this case nonetheless is not justiciable because it is a dispute between the political Branches. That position cannot be reconciled with this Court's precedents.

The Court relies primarily upon standing principles to establish whether a matter is "appropriately resolved through the judicial process." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted); see also *Raines*, 117 S. Ct. at 2322 (defining the scope of the "restricted role for Article III courts" through principles of "personal" and "concrete injury"). It has, in addition, articulated several other considerations that bear on whether the exercise of Article III jurisdiction will impermissibly implicate separation of powers concerns. Those considerations favor review in this case. First, Congress passed and the President signed legislation specifically authorizing the Court to resolve this controversy, thereby "significantly



lessen[ing] the risk of unwanted conflict with the Legislative Branch," *Raines*, 117 S. Ct. at 2318 n.3, and "inappropriate interference in the business of other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (discussing political question doctrine).

Second, the exercise of jurisdiction in this case will not "put the federal courts into the regular business of deciding [inter-branch] . . . policy disputes." This is not simply a "policy dispute," nor an attempt by Congress to impinge upon the Executive's general authority to execute and enforce the law. This case presents a unique instance where the Executive's actions directly threaten concrete, particularized interests of a House of Congress. Congress has rarely authorized litigation to protect its interests, and has no authority to file suit under the myriad of general laws authorizing aggrieved persons to challenge agency action.<sup>25</sup> Here, however, Congress has afforded the House an express cause of action, and, if Appellants are correct that no private party can establish standing before the census is conducted, the House has no other recourse to protect its institutional interests.<sup>26</sup>

Third, this case presents purely legal issues of the type which federal courts "traditionally resolve." *United States v. Nixon*, 418 U.S. 683, 696 (1974). It merely subjects the legality of Appellants' program to use sampling to judicial

<sup>25</sup> See *Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 128 (1995) (agency official acting in governmental capacity is not a person "adversely affected or aggrieved" within meaning of statute authorizing judicial review even though he had Article III standing).

<sup>26</sup> Compare *Raines*, 117 S. Ct. at 2322 (reserving question whether plaintiffs would have had standing if dismissal would have "foreclos[ed] the Act from constitutional challenge"). If this Court concludes that the Appellees in *Glavin* have standing, however, the House's institutional interests will be protected, and the Court will not need to determine separately whether the House has standing in this case. See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16 (1963).

review, and puts no "additional burden" on the Executive beyond that which this Court has previously approved.<sup>27</sup>

Contrary to Appellants' argument, there is no bright-line constitutional prohibition on judicial resolution of intra-governmental disputes.<sup>28</sup> Thus, in *Chadha*, the Senate and House of Representatives intervened in the court of appeals after that court held that the legislative veto was unconstitutional, and filed petitions for certiorari naming the Executive Branch (which had sided with Chadha) as a respondent. 462 U.S. at 938. This Court observed that the "controversy may, in a sense, be termed 'political,'" *id.* at 942, but that "[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications." *Id.* at

<sup>27</sup> See *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (constitutionality of President's decisions concerning decennial census is subject to judicial review); see also *Clinton v. Jones*, 117 S. Ct. 1636, 1649 (1997) ("[W]e have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law"); *Morrison v. Olson*, 487 U.S. 654, 693 n.33 (1988) (finding no "constitutional problem" with provision for judicial review of Attorney General's decision to remove the independent prosecutor because "judicial review" does not "put any additional burden on the President's exercise of executive authority").

<sup>28</sup> See, e.g., *Ingalls Shipbuilding*, 117 S. Ct. at 805 (confirming that Congress can "confer[ ] standing" on a government official challenging actions of another governmental entity that allegedly "impair[ed] [his] ability to achieve the . . . purposes and to perform the administrative duties . . . prescribe[d]" by a law he had a role in administering); *United States v. Will*, 449 U.S. 200 (1980) (class action on behalf of federal judges challenging constitutionality of statute affecting judicial compensation); *United States v. Nixon*, 418 U.S. at 697 (upholding claims of special prosecutor in a dispute with the President over the disclosure of information: the "mere assertion of a claim of an 'intra-branch dispute,' without more, has never operated to defeat federal jurisdiction"); see also *Goldwater v. Carter*, 444 U.S. 996, 1001 (1979) (Powell, J., concurring) (if Congress and the President adopted "irreconcilable" legal positions, the "specter of the Federal Government brought to a halt because of the mutual intransigence of the President and Congress would require this Court to provide a resolution pursuant to our duty 'to say what the law is'").



943 (discussing political question doctrine). The Court held that the Legislature was a "proper petitioner," and that the dispute was "beyond [a] doubt" cognizable under Article III as of "Congress' formal intervention." *Id.* at 939.<sup>29</sup>

In *Raines*, although the Court dismissed for lack of Article III standing a facial challenge by six Members of Congress to the Line Item Veto Act, it acknowledged that a legislative body can have judicially cognizable institutional interests in certain concrete settings. 117 S. Ct. at 2319-20 (declining to overrule *Coleman v. Miller*, 307 U.S. 433 (1939)). The individual Members lacked standing because they alleged merely an abstract dilution of legislative power. 117 S. Ct. at 2318. Here, the House asserts concrete interests that do not implicate its "authority or power," have long been deemed justiciable, and are far more concrete than those found cognizable in *Chadha* and *Coleman*. *Id.* at 2321-22.<sup>30</sup>

## II. THE CENSUS ACT FORBIDS THE SECRETARY FROM USING SAMPLING FOR APPORTIONMENT

To justify their radical departure from the way the census has been conducted for 200 years, Appellants have also

<sup>29</sup> Since *Chadha*, Congress and the Executive have been adverse parties in a number of cases adjudicated in this Court. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>30</sup> Although the Court noted in *Raines* that "analogous, [historical] confrontations between one or both Houses of Congress and the Executive Branch" did not result in litigation, 117 S. Ct. at 2321, that history is not controlling here. Unlike here, the historical examples referenced all concerned injuries to "authority or power." Most involved statutory restrictions on presidential prerogatives (such as the Tenure of Office Act) that the President believed to be unconstitutional. See *Raines*, 117 S. Ct. at 2321-22. In those circumstances, the President could have prevented the injury by refusing to obey the statute. See, e.g., *Meyers v. United States*, 272 U.S. 52 (1926) (holding successor to Tenure of Office Act unconstitutional in suit brought by Postmaster who had been removed by the President in spite of the statute). In contrast, Congress cannot unilaterally prevent the injuries at issue here.

departed radically from their previous interpretation of the governing law. Initially, the Bureau concluded that the Census Act, as amended in 1976, "clearly" prohibited any use of sampling for apportionment.<sup>31</sup> The Solicitor General told this Court, flatly, that "13 U.S.C. § 195 prohibits the use of statistical 'sampling methods' in determining the state-by-state population totals," including to "adjust[] the December 31 figures." *Klutznick v. Young*, Application for Stay Pending Appeal to the United States Court of Appeals for the Sixth Circuit 14 n.7 (Dec. 1980) (No. A-533). After several district courts held that § 195 only prohibited sampling as a *substitute* for traditional methods of enumeration, however, the Bureau adopted the view that the statute could be read either as a complete prohibition on sampling or the more limited prohibition indicated by the court decisions.<sup>32</sup>

The Bureau remained skeptical. In 1993, Acting Director Harry A. Scarr testified that the Bureau might need "specific legislative changes" for the 2000 census because § 195 "allows using sampling techniques except for determining the population for purposes of apportion[ment]."<sup>33</sup> Later

<sup>31</sup> See United States Dep't of Commerce, *Census Undercount Adjustment: Basis for Decision*, 45 Fed. Reg. 69,366, 69,372 (1980) ("Title 13 clearly continues the constitutional mandate and historical precedent of using the 'actual Enumeration' for purposes of apportionment, while eschewing estimates based on sampling or other statistical procedures, no matter how sophisticated"); see also *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd*, 652 F.2d 617 (6th Cir. 1981), *cert. denied sub nom.*, *Young v. Baldrige*, 455 U.S. 939 (1982); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663 (E.D. Pa. 1980); *Carey v. Klutznick*, 508 F. Supp. 404 (S.D.N.Y. 1980), *rev'd*, 653 F.2d 732 (2d Cir. 1981), *cert. denied*, 455 U.S. 999 (1982); *Orr v. Baldrige*, (S.D. Ind. 1985), Cause No. 1F 81-604-C, D.E. 19, Exh. 3.

<sup>32</sup> See, e.g., *Problem of Undercount in 1990 Census*, Hearing before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service, 100th Cong., 1st Sess. 22 (July 14, 1987).

<sup>33</sup> *Review of Major Census Bureau Programs in 1993*, Hearing before the Subcomm. on Census, Statistics, and Postal Personnel of the House Comm. on Post Office and Civil Service, 103d Cong., 1st Sess. 14 (Mar. 2, 1993).



that year, Scarr announced that the Bureau was planning a "historic departure from 200 years of census-taking" by "combining counting and estimation," and reiterated his "personal belief" that the Bureau might need legislation to permit it to implement that plan.<sup>34</sup> The Bureau ultimately abandoned any attempt to obtain authorizing legislation, however, instead choosing to rely on a Department of Justice opinion that § 195 prohibits sampling only when used as a substitute for traditional methods of enumeration.<sup>35</sup>

After this litigation began, Appellants adopted a far more radical theory. They now assert that § 195 prohibits nothing, and instead gives the Secretary complete discretion to determine the population for apportionment purposes by means of statistical sampling. Remarkably, Intervenor Gephardt, *et al.* maintain that this new interpretation — flatly inconsistent with the views expressed by Appellants on dozens of occasions over a 17 year period and the unanimous decisions of two three-judge panels — is required by the plain language of the Census Act.<sup>36</sup>

<sup>34</sup> *Review of the Status of Planning for the 2000 Census, Hearing before the Subcomm. on Census, Statistics, and Postal Personnel of the House Comm. on Post Office and Civil Service, 103d Cong., 1st Sess. 809 (Oct. 7, 1993).*

<sup>35</sup> See J.A. 136; Mem. for the Solicitor General from Walter Dellinger, Ass't Attorney General 9-14 (Oct. 7, 1994) ("Dellinger Mem."), D.E. 19, Exh. 7; see also Letter from Stuart M. Gerson, Ass't Attorney General, Civil Div., to the Hon. Wendell L. Willkie, II, General Counsel, United States Dep't of Commerce 18 (July 9, 1991) ("Gerson Letter"), D.E. 19, Exh. 1 ("Section 195's sampling provision is subject to two divergent interpretations": (1) "that Section 195, on its face, prohibits statistical adjustment"; or (2) "that a statistical adjustment ... carried out as a substitute for a headcount could violate Section 195").

<sup>36</sup> Although several Intervenor claim that Appellants' current interpretation is due deference under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), Appellants themselves — correctly — do not even cite *Chevron*. Their current stance has all the earmarks of a "position established only in litigation ... developed hastily, or under special pressure," and therefore undeserving of deference. *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (citation

Under Appellants' current interpretation, nothing in the Census Act would prevent the Secretary from sampling as few as 20% of the population, using methods that provide no safeguards against political manipulation, and choosing to use sampling in some decennial censuses but not others based upon undisclosed policy (or political) objectives. Given the enormous complexity and discretion involved in the design and application of such a program,<sup>37</sup> the Secretary's decisions could have an enormous impact on the apportionment of Representatives in Congress. There is no basis in the text, traditional canons of construction, or common sense to believe that Congress has allowed that to occur.

#### A. The Census Act Can Only Reasonably Be Read To Forbid Sampling For Apportionment

Appellants criticize the district court for focusing principally on § 195 — the section that specifically addresses the use of sampling for apportionment — and for applying traditional canons of construction to confirm its meaning. In Appellants' view, this case begins and ends with the general language of 13 U.S.C. § 141(a). Appellants are mistaken.

omitted). In any event, the 1998 Appropriations Act makes clear Congress's intent that this Court (and not Appellants) resolve any ambiguity in the 1976 legislation. Compare *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996). Moreover, *Chevron* itself confirms that Congress presumes that the courts must first exhaust the "traditional tools of statutory construction," and that deference is inappropriate where, as here, traditional means of interpretation yield "clear congressional intent." 467 U.S. at 843 n.9. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 923 (1995) (refusing to defer where Justice Department's interpretation would raise a serious constitutional question); accord *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

<sup>37</sup> See, e.g., United States Bureau of the Census, *Assessment of Accuracy of Adjusted Versus Unadjusted 1990 Census Base for Use in Intercensal Estimates: Report of the Comm. on Adjustment of Postcensal Estimates* 5 (Aug. 7, 1992) (1990 sampling program "was a very complex process that combined elements of survey design, interviewing, matching, imputation, mathematical modeling and professional judgment").

The district court correctly took instruction from the more specific provision and correctly viewed that provision in its statutory and historical context.

1. Section 141(a) provides in relevant part as follows:

*The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. (Emphasis added).*

Appellants' entire argument hinges on the proposition that the italicized language constitutes a specific and unambiguous authorization to use sampling to determine the population for purposes of apportionment. The proposition, however, is untrue.

To begin with, § 141(a) is not targeted specifically to determining the population for apportionment purposes. Section 141(a) authorizes and directs the Secretary to take the "decennial census of population." In addition to the population counts used for apportionment, the term "census of population" is expressly defined to include a myriad of demographic information concerning "population, housing, and matters relating to housing." 13 U.S.C. § 141(g). Since 1940, the Secretary has collected the vast bulk of this statistical data by surveying a sample of U.S. households with an expanded "long form" questionnaire. Bureau of the Census, *200 Years of Census Taking: Population and Housing Questions, 1790-1990*, at 4, 98 (Nov. 1989).<sup>38</sup> The reference to

<sup>38</sup> The 1990 "census of population" comprised 45 distinct items of information, ranging from occupation and income to primary language and level of education. Bureau of the Census, *Official 1990 U.S. Census Form*. In 2000, "the long form will ask the same 7 questions that appear on the short form, plus questions on an additional 27 subjects that are either specifically required by law to be included in the census or are required to implement other federal programs." J.A. 85-86.

"sampling" in § 141(a) acknowledges the Secretary's continuing authority to use sampling for those purposes.

Second, the reference to sampling and special surveys in § 141(a) is limited by other, more specific provisions of the Act. Appellants accept that § 193 – not § 141(a) – governs the use of special surveys, and that § 193 limits these surveys to the collection of "preliminary and supplemental statistics." 13 U.S.C. § 193.<sup>39</sup> Appellants also concede that § 195 – not § 141(a) – governs the Secretary's "use of sampling" to collect all information other than the population count used for apportionment, and that § 195 requires the Secretary to use sampling for these purposes "if he considers it feasible." 13 U.S.C. § 195. Accordingly, the district court quite reasonably looked to § 195 for specific guidance on the use of sampling to determine the population for apportionment purposes. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989) ("A statutory general rule usually does not govern unless there is no more specific rule"). Seemingly broad general grants of authority are commonly subject to specific limitations found elsewhere in a statute,<sup>40</sup> and, as between § 141(a) and § 195, the latter is "clearly the more specific." J.S. App. 61a. Whereas § 141(a) references the Secretary's "authority to conduct the entire decennial census," § 195 addresses "when sampling may be used (and when it may not)," and directly addresses the use of sampling for purposes of apportionment. J.S. App. 62a.

Appellants in effect argue (Br. 31) that, because § 195 governs the Secretary's authority to use sampling for all other purposes, § 141(a) *must* be interpreted to afford the

<sup>39</sup> The Bureau concedes that the Secretary may not use special surveys as the basis for apportionment. See *Oversight Hearing I* at 69.

<sup>40</sup> See, e.g., *United States v. Giordano*, 416 U.S. 505, 512-14 (1974) (specific provision regarding wiretaps limits Attorney General's broad authority to delegate responsibilities); *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (specific provisions regarding arrests of bankrupts limit broad power granted to Bankruptcy Courts).



Secretary unqualified discretion to use sampling for apportionment purposes so that the reference to sampling in § 141(a) will retain *some* independent meaning. Appellants correctly discern that adherence to the specific instructions in § 195 renders § 141(a)'s illustrative reference to sampling of no substantive import, but this merely reflects Congress's modest intentions. When Congress added the phrase "in such form and content as he may determine, including the use of sampling procedures" to § 141(a), it did not intend to imbue the Secretary with new authority over methodology. The Secretary was already authorized by § 5 to "determine the number, form, and subdivisions" of the questionnaires used in the census, Act of Aug. 31, 1954, ch. 1158, § 1, 68 Stat. 1012, 1013, and was already authorized by §§ 193 and 195 to use special surveys and sampling techniques, Act of Aug. 28, 1957, Pub. L. No. 85-207, § 14, 71 Stat. 481, 484 (1957). The phrase added in 1976 references this existing authority – a purpose which amply satisfies the law's desire to attribute to all language some statutory purpose.<sup>41</sup>

Appellants' insistence that Congress must have intended the reference to sampling in § 141(a) to carry independent force is conclusively refuted by § 141(d). Subsection (d) provides in relevant part that "the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population *in such form and content as he may determine, including the use of sampling procedures and special surveys.*" 13 U.S.C. § 141(d) (emphasis added). If the italicized language – the same as that in subsection (a) – were interpreted to vest the Secretary with unqualified discretion to determine how sampling will be used in the

<sup>41</sup> See *Walters v. Metropolitan Educ. Enters.*, 117 S. Ct. 660, 665 (1997) ("[T]he 'mere' elimination of evident ambiguity is ample – indeed, admirable – justification for the inclusion of a statutory phrase"); *United States v. Naftalin*, 441 U.S. 768, 778 (1979) (though statutory provisions are interpreted so as to avoid surplusage, "that there may well be some overlap is neither unusual nor unfortunate") (citation omitted).

mid-decade census, the provision would conflict with § 195; because the information obtained in a mid-decade census cannot be used for apportionment (see 13 U.S.C. § 141(e)(2)), § 195 already *requires* the Secretary to use sampling in the mid-decade census whenever he considers it feasible. To preserve statutory harmony, therefore, the phrase in subsection (d) – and the identical phrase in subsection (a) – must be read merely as a general reference to authority that is spelled out in greater detail in § 195.

2. Section 195 states that the Secretary "shall, if he considers it feasible, authorize the use of . . . 'sampling' in carrying out his statutory duties, *"except for the determination of population for purposes of apportionment of Representatives in Congress."* 13 U.S.C. § 195 (emphasis added). Appellants argue that the proviso in § 195 merely excepts the constitutional count from the statutory rule that governs the use of sampling for all other purposes, and that the Court must look back to the general language of § 141(a) to understand the scope of the Secretary's authority to use sampling for apportionment purposes. This argument is implausible on its face.<sup>42</sup> If Congress had intended after 200 years to authorize the Secretary to use population estimates in lieu of counting the people, it would have made that intention manifest. Read in its statutory and historical context, the meaning of the proviso in § 195 is plain: Congress has precluded the Secretary from estimating the population

<sup>42</sup> Before this lawsuit, the Bureau, the Secretary, the Justice Department, and virtually every court that had interpreted the proviso read it to convey a prohibition. See *supra* at 24-27. Mem. from John M. Harmon, Ass't Attorney General, Office of Legal Counsel, to Alice Daniel, Ass't Attorney General, Civil Div., at 3. (Sept. 25, 1980), D.E. 19, Exh. 6 (distinguishing between permissible "adjustment" and "sampling," which is prohibited by § 195); Gerson Letter, at 8 ("An argument that adjustment is *barred* begins with the prohibition found in Section 195"); Dellinger Mem., at 10 (analyzing "scope" of "section 195's prohibition on the use of 'sampling'"). Only one district court judge has adopted Appellants' contrary interpretation (over Appellants' objections). See *City of Philadelphia*, 503 F. Supp. at 679.

for purposes of apportionment, just as it has done in every Census Act since 1790.

Appellants no longer dispute that, as a matter of ordinary usage, the syntax of § 195 – an exception from a command to do “X” – can convey either a prohibition against doing “X” or a delegation of discretionary authority to do “X” with respect to the subject matter of the exception. Br. 29 n.15. Appellants also assert that the meaning of this type of proviso depends on whether it is likely that the treatment of the excepted class would have been committed to the discretion of the party addressed, which must be gleaned from background knowledge and context. *Id.* Appellants, however, insist that in this case the “operative” and exclusive “background rule” is § 141(a). *Id.* There is no reason – other than a desire to reach (or avoid) a particular end result – to return immediately to the general (and inconclusive) language of § 141(a) and abandon so quickly the attempt to discern, through statutory context and background, the meaning of the more specific proviso in § 195.<sup>43</sup>

a. Taking into account statutory context and the significance to Congress of the constitutional enumeration, it is exceedingly unlikely that Congress would have delegated to the Secretary unqualified discretion over the use of statistical sampling without enacting a plain statement to that

<sup>43</sup> Intervenor City of Los Angeles, *et al.*, make the same error. They suggest that the district court’s metaphor for § 195 – “Except for my grandmother’s wedding dress, you shall take the contents of my closet to the cleaners” – is incomplete. In their view, a complete wedding dress analogy would include a parallel to § 141(a), which would state: “You have discretion to take my grandmother’s wedding dress to the cleaners.” Br. 19. To the extent that an analogy to § 141(a) may be helpful, this one is plainly flawed. Section 141(a) does not state that “the Secretary has discretion to use sampling to determine the population for purposes of apportionment.” A better analogy might read as follows: “You shall clean and organize the closet in such manner as you may determine, including sending clothes to the cleaners.” Nothing in this version of § 141(a) could reasonably be read to override the prohibition in § 195 against taking grandmother’s wedding dress to the cleaners.

effect. Whether the people will be counted for purposes of apportionment, or instead estimated through sampling, is a fundamental decision that involves not only census accuracy, but also unique policy issues relating, *inter alia*, to maintenance of public faith in and acceptance of the apportionment process, and the potential for political manipulation. *See, e.g., City of New York*, 517 U.S. at 11-12. *See supra* at 19-21. Congress would not have delegated this decision casually, and should not be deemed to have done so inadvertently.

Where the Census Act permits the Secretary to use sampling, it provides standards. Section 195, as noted, requires the Secretary to use sampling for purposes other than apportionment when “he considers it feasible.” 13 U.S.C. § 195. Section 181 allows the Secretary to use sampling to collect annual population figures when he “determines [sampling] will produce current, comprehensive, and reliable data.” 13 U.S.C. § 181(a). If Congress believed it necessary to guide the Secretary’s decisions respecting sampling for these purposes, it is implausible that Congress would have left it entirely up to the Secretary to decide whether to use sampling for purposes of apportionment.<sup>44</sup>

b. Appellants are unable to provide a plausible alternative explanation of why Congress would have excepted the apportionment count from § 195’s mandate. They suggest that Congress intended to permit the Secretary, with respect to apportionment, to determine “what measures will

<sup>44</sup> Indeed, this would raise serious issues of undue delegation. *See National Cable Television Ass’n v. United States*, 415 U.S. 336, 342 (1974). Although Congress may delegate power under broad general directives, it must “clearly delineate[] the general policy” and supply an “intelligible principle” to guide an agency’s decision-making processes. *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989). The Census Act, however, contains no “intelligible principle[s]” to guide the Secretary in making the numerous discretionary decisions that he would have to make to determine whether, and if so, how, to conduct sampling. The absence of a plain statement effecting so broad and momentous a delegation of authority suggests that no such delegation was intended.



ensure the most accurate population figures practicable." Br. 30; *accord* Gephardt Br. 21 (because the Bureau had not yet perfected sampling-based adjustment procedures in 1976, Congress might have decided to leave the "judgment call" to "the 'experts'"). This explanation does not withstand scrutiny. In the context of apportionment, the feasibility standard established in § 195 would surely be broad enough to permit the Secretary to insist upon the use of the method that will produce "the most accurate population figures practicable." *See* Appellants' Br. 28 n.14 (the Secretary "retains meaningful discretion" to determine whether sampling should be employed"). No special exception would have been needed.

c. The implausibility of Appellants' contention that Congress casually delegated to the Secretary the unfettered authority to use sampling for apportionment purposes is even more apparent when framed in historical context. As of 1976, when Congress enacted the language on which Appellants rely, Congress had prohibited census takers from using statistical estimates to fulfill this important constitutional function for 186 years.

The First Congress implemented that prohibition in 1790 by requiring census takers to make an "enumeration" of every person within their districts, and to record each person on a schedule by family name. Act of Mar. 1, 1790, ch. 2, 1 Stat. 101, 103. The Act of March 26, 1810 continued the prohibition by requiring the enumeration to be made "by an actual inquiry at every dwelling house, or of the head of every family within each district, *and not otherwise.*" Ch. 17, 2 Stat. 564, 565 (emphasis added). This injunction was repeated in substantially the same form in the acts that governed each of the following 14 censuses.<sup>45</sup> In 1954, when

<sup>45</sup> Acts of Mar. 23, 1830, ch. 36, 4 Stat. 383, 384, and Mar. 3, 1839, ch. 80, 5 Stat. 331, 332. The Act that governed the seventh, eighth, and ninth censuses required the census takers to make "a personal visit to each dwelling house" and ascertain responses "by inquiries made of some

the current Census Act was codified, 13 U.S.C. § 25(c) required enumerators to obtain "every item of information and all particulars required for any census" by personal inquiry of each household (or, failing that, from a neighbor). Act of Aug. 31, 1954, ch. 1158, 68 Stat. 1012, 1015.

Congress amended the Census Act in 1957 at the behest of the Secretary of Commerce. The Secretary believed that "some of the information which is desired in connection with a census could be secured efficiently through a sample survey," but he was uncertain of his legal authority to derive any census information through sampling.<sup>46</sup> Accordingly, Congress enacted § 195, which provided that:

*[e]xcept for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.*

Pub. L. No. 85-207, 71 Stat. 481, 484 (emphasis added). This provision accomplished two tasks, each unequivocally: It authorized the Secretary, as a general matter, to use sampling techniques to collect information; and it prohibited the

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member of each family" or "the agent of such family." Act of May 23, 1850, ch. 11, § 10, 9 Stat. 428, 430 (as amended by the Act of Aug. 30, 1850, ch. 43, 9 Stat. 445). The Acts that governed the following eight censuses afforded similar instructions. *See* Act of Mar. 3, 1879, ch. 195, § 8, 20 Stat. 473, 475, as amended by Act of Apr. 20, 1880, ch. 57, 21 Stat. 75; Act of Mar. 1, 1889, ch. 319, § 9, 25 Stat. 760, 763; Act of Mar. 3, 1899, ch. 419, § 12, 30 Stat. 1014, 1018; Act of July 2, 1909, ch. 2, § 12, 36 Stat. 1, 5; Act of Mar. 3, 1919, ch. 97, § 12, 40 Stat. 1291, 1296; Act of June 18, 1929, ch. 28, § 5, 46 Stat. 21, 22 (which governed the fifteenth, sixteenth, and seventeenth censuses).

<sup>46</sup> *Amendment of Title 13, United States Code, Relating to Census: Hearing before the House Comm. on Post Office and Civil Service, 85th Cong., 1st Sess. 4, 7 (June 19, 1957).* The Secretary observed, *inter alia*, that it had "generally been held that the term 'census' implie[d] a complete enumeration." *Id.*



Secretary from using sampling to determine the population for purposes of apportionment.<sup>47</sup>

Appellants contend that the proviso in § 195 did not itself constitute a "freestanding" prohibition, but merely indicated sampling for apportionment purposes was still prohibited by § 25(c). Br. 34. This theory gets Appellants nowhere. Appellants agree that, when enacted, the proviso in § 195 was an express affirmation of Congress's intent to continue that prohibition. Irrespective of whether the proviso in § 195 was a "freestanding" prohibition when it was enacted, it clearly was a freestanding prohibition after Congress eliminated § 25(c) in 1964 to permit the Bureau to take the census by mail.<sup>48</sup> See Pub. L. No. 88-530, 78 Stat. 737 (1964); H.R. Rep. No. 88-373 (1964). Appellants do not contend that the 1964 legislation authorized sampling, an interpretation that would render the proviso at that time meaningless.<sup>49</sup>

<sup>47</sup> See also H.R. Rep. No. 85-1043, at 10 (1957) (while § 195 permits the Secretary of Commerce to "authorize the use of the statistical method known as sampling in carrying out" his statutory duties, it "does not authorize the use of sampling procedures in connection with apportionment of Representatives.") (emphasis added); accord S. Rep. No. 85-698, at 3 (1957).

<sup>48</sup> The enactment of Section 195 itself addressed (insofar as the statute was concerned) the Secretary's concern that the term "census" precluded the use of sampling. See *supra* note 46.

<sup>49</sup> Intervenor Gephardt, *et al.*, argue that Congress had no intent in 1957 to bar the Secretary from using sampling techniques to "adjust" the population numbers used for apportionment. See, e.g., Br. 16, 22-23. The lawfulness of sampling used solely for purposes of adjustment is not presented in this case because, in lieu of a complete enumeration, Appellants plan to take only a sample survey of those households that fail to respond by mail. In any event, Intervenor — who otherwise claim the mantle of plain language — do not even attempt to ground their special plea for sampling-based "adjustment" on the text of the Act. Nor can they. Appellants concede that their plan "uses sampling" to derive the final census numbers. J.A. 83, 85, 92-93, 123. The proviso in § 195 either forbids the Secretary to use sampling in determining the population for apportionment purposes, or it leaves the decision whether and how to use sampling for apportionment entirely within the Secretary's discretion. The words permit no intermediate position.

In 1976, Congress amended the second clause of § 195, changing "may where . . . appropriate" to "shall if . . . feasible," but left the proviso in the first clause substantively intact. Appellants argue that the modification of the Secretary's discretion to sample for other purposes (by implication) changed the meaning of the proviso, eliminating the long-standing prohibition against using sampling for purposes of apportionment. It borders on the absurd to suggest that Congress would enact such a momentous change in such an oblique fashion.<sup>50</sup>

Although Congress has permitted, even required, the use of sampling techniques to collect information respecting the nation's population and housing, it has since 1790 required that the constitutional aspect of the census be taken as an actual count of identified people.<sup>51</sup> When Congress

<sup>50</sup> Intervenor argues that reading the 1976 amendments in this fashion would be consistent with Congress's "tradition" of encouraging innovation in the census and Congress's "tradition" of affording the Secretary with increasing discretion over the census process. See Gephardt Br. 9-10, 31; Cal. Legis. Br. 22, 28-29. These arguments are without merit. While Congress has delegated the Secretary greater authority over the course of time, the 1976 amendments actually constrained the Secretary's authority in several respects. See, e.g., Act of Oct. 17, 1976, Pub. L. 94-521, §§ 141(f), 181(b), 195, 90 Stat. 2459, 2462-64 (1976). Moreover, when Congress amended the Census Act prior to 1976 to afford the Secretary authority to use new census methods — as it did in 1957 to authorize the use of sampling for non-apportionment purposes and in 1964 to permit use of the mails — it did so expressly and after protracted legislative debate. See *infra* at 42-44.

<sup>51</sup> Appellants observe (Br. 48-49 & n.29) that the Bureau deviated from this tradition in 1970, when it became aware late in the process that a substantial number of dwelling units had been erroneously classified as vacant, and that enumerators had missed a substantial number of households for which the Postal Service had current addresses. Lacking the time and funds to correct these errors by recanvassing all of the affected housing units, the Bureau inferred the number of persons missed from sample surveys (see 45 Fed. Reg. at 69,373-74), adding 1,553,000 persons to the overall count. See United States Dep't of Commerce, *The Effect of Special Procedures to Improve Coverage in the 1970 Census* 11-16 (GPO 1974). The then-Associate Director for Statistical Standards and Methodology testified that this made the Bureau "uneasy," because the Bureau



authorized the use of sampling in § 195 to collect supplemental data, it made that authorization express and specifically excepted the determination of the population for purposes of apportionment. If Congress had intended in 1976 to permit sampling for apportionment purposes, there is every reason to expect that Congress would have made that authorization equally express. Congress's re-enactment of the proviso without substantive change can only reasonably be read to continue the prohibition against sampling for this purpose. Appellants' "statutory argument would require [this Court] to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994).

The absence of plain language to support their argument is fatal to Appellants' position in this case. This Court has often stated that "[i]t is not lightly to be assumed that Congress intended to depart from a long established policy." See, e.g., *United States v. Wilson*, 503 U.S. 329, 336 (1992) (Thomas, J.) (quoting *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 627 (1925)). Where Congress has "firmly established" a policy over time, the Court presumes, absent a plain statement otherwise, that Congress intended to continue that policy in subsequently enacted legislation. See *United States v. Sweet*, 245 U.S. 563, 571 (1918); accord *Chisom v. Roemer*, 501 U.S. 380, 396 (1991); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 785-88 (1981).<sup>52</sup> This presumption takes on special force

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understood that it was "not supposed to use sampling [in that manner] for the basis of the apportionment counts." See Gerson Letter at 15. The Bureau's use of sampling in 1970 was an anomaly, occasioned by exigent circumstances, not a meaningful departure from tradition. See *City of New York*, 517 U.S. at 21-22.

<sup>52</sup> Indeed, the Court has applied this maxim in cases where the statutory language was far clearer than the text at issue here. See, e.g., *Robertson*, 268 U.S. at 622, 627 (construing statute allowing Railroad Labor Board to invoke the aid of "any District Court of the United States" to compel the attendance of a witness as referring to any district court in

where, as here, the departure from long established policy would implicate "traditionally sensitive areas," such as the distribution of political power, see *United States v. Bass*, 404 U.S. 336, 349 (1971) (construing statute to avoid upsetting the federal-state balance); see also *Public Citizen*, 491 U.S. at 466 (construing statute to avoid having to decide constitutional issues that "concern the relative powers of the coordinate branches of government"), and raise grave constitutional doubts. *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1228 (1998).<sup>53</sup> In the circumstances of this case, an insistence upon plain language is essential to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349.<sup>54</sup>

#### B. The Legislative History Confirms That Congress Had No Intent To Eliminate The Prohibition Against Sampling For Apportionment

The 1976 amendments were the product of numerous hearings over the course of many Congresses. Yet there is

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whose district the witness lives or can be found, in light of Congress's historical reluctance to grant nationwide jurisdiction to district courts).

<sup>53</sup> The Bureau itself previously concluded that sampling is unconstitutional. See 45 Fed. Reg. at 69,372. Several Intervenor and amici suggest that the doctrine of constitutional doubt argues in favor of interpreting the Act to permit sampling, because (they assert) the Constitution may require the Secretary to use the most accurate method practicable. This argument has no weight. Even assuming that Appellants' sampling methodologies would produce a more accurate distributive result, this Court held in *City of New York* that the Constitution does not require the government to "conduct a census that is as accurate as possible." 517 U.S. at 17.

<sup>54</sup> Intervenor's reliance (Br. 12) on *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), and *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980), is also unavailing. These cases merely hold that silence in the legislative history will not prevent the Court from adopting the "obvious" (*Harrison*, 446 U.S. at 592) or "natural" (*Morales*, 504 U.S. at 385 n.2) interpretation of a statute. Neither case suggests that historical context cannot inform the meaning of ambiguous language.



no dispute that there was never *any* discussion, debate, or mention of a proposal to repeal the long-standing prohibition on the use of sampling for purposes of apportionment and to delegate unlimited discretion to the Secretary to determine the population on the basis of estimates. It is inconceivable that Congress could have repealed the primary statutory limitation on the Secretary's discretion to conduct the constitutional census without leaving a trace of that decision in the legislative record, *see Chisom*, 501 U.S. at 396 & n.23 (likening Congress's silence in similar circumstances to "the dog that did not bark"); *Green*, 490 U.S. at 527 (looking to legislative history to confirm "that what seems to us an unthinkable disposition . . . was indeed unthought of") (Scalia, J., concurring in the judgment), and without Appellants — who participated actively in the amendment process — realizing that sampling for apportionment purposes no longer "remained prohibited," J.S. App. 50a (citing 45 Fed. Reg. 69,366, 69,371-73 (1980)). In fact, the detailed legislative history of the 1976 Act explains the changes to §§ 141(a) and 195 in terms that refute Appellants' contention that Congress intended to effectuate any such repeal.

1. The primary purpose of the 1976 amendments "was to provide for a mid-decade census to be used for various purposes (not including apportionment)." *Franklin*, 505 U.S. at 817 n.16 (Stevens, J., concurring in the judgment). The legislation also addressed concerns that the Bureau was requiring the citizenry to answer too many questions in the decennial census. *See* H.R. Rep. No. 94-944, at 5 (1976).<sup>55</sup> Congress addressed this burden (and expense) by adding § 141(f) to require the Secretary to submit the questions to Congress in advance of the census; by amending § 195 to require the Secretary to collect data through sampling

<sup>55</sup> Although the Secretary progressively made greater use of sampling, the "short form" used in 1970 still required every household to disclose 20 different items of information in addition to the basic headcount. *200 Years of U.S. Census Taking* at 83, 86.

"whenever feasible," except for purposes of apportionment; and by emphasizing that authority by referencing it in § 141(a) and (d).

Appellants reject this straightforward explanation of the modest changes made to the decennial census in 1976. They insist that Congress established *two* new rules governing the use of sampling: (1) a permissive rule authorizing the Secretary to use sampling for apportionment in his discretion; and (2) a mandatory rule requiring the Secretary to use sampling for non-apportionment purposes "whenever feasible." The Committee Reports and debates, however, uniformly refer to the adoption of a single new rule governing sampling: a *directive* to encourage the use of sampling whenever feasible — a change that pertains exclusively to the use of sampling for non-apportionment purposes. The House and Senate committee reports both state that the "purpose" of the legislation with respect to sampling is to "*direct[]* the Secretary" to use sampling instead of "enumeration" whenever "feasible." H.R. Rep. No. 94-944, at 2; S. Rep. No. 94-1256, at 2 (1976) (emphasis added).<sup>56</sup> The Conference Report further explains that the new language in § 195 only "differs" from the prior version in one respect: the section previously "grant[ed] the Secretary discretion to use sampling when it [wa]s considered appropriate," and the new version "strengthens congressional intent that, whenever possible, sampling *shall* be used." H.R. Conf. Rep. No. 94-1719, at 13 (1976) (emphasis added).<sup>57</sup> These explanations make it crystal clear that Congress only intended to change the standard governing the use of sampling for non-apportionment pur-

<sup>56</sup> Five legislative purposes are identified. Granting the Secretary discretion to use sampling for apportionment is not among them. S. Rep. No. 94-1256, at 1; H.R. Rep. No. 94-944, at 2-3.

<sup>57</sup> *See also* H.R. Rep. No. 94-944, at 6 (the Act "revises Section 195 of title 13 which presently authorizes, but does not require, the use of sampling. This clarifies congressional intent that, wherever possible, sampling *shall* be used") (emphasis added).



poses, and had no intent to alter the meaning of the proviso forbidding the use of sampling for apportionment. As the Conference Report confirms, the amendment to § 195 "require[s] . . . the use of sampling procedures . . . whenever [the Secretary] deems it feasible, except in the apportionment of the U.S. House of Representatives." *Id.*

Nor can Appellants find any support for their claim of a newly-created delegation of authority to use sampling for apportionment in the explanation of the changes to the language of § 141(a). At the time, Appellants stated that this amendment merely represented a "rewording" of the existing law -- a characterization that corresponds to the House's view that § 141 was not a grant of new authority. *Mid-Decade Census Legislation, Hearing before the Subcomm. on Census and Statistics of the Senate Comm. on Post Office and Civil Service, 94th Cong., 2d Sess. 24 (July 29, 1976) ("1976 Senate Hearing")*. Similarly, the Conference Report states that § 141(a), as revised, is "essentially the same as the provisions of existing law, except that a reference is made (as in the case of the mid-decade census) to the use of sampling procedures and special surveys." Conf. Rep. No. 94-1719, at 11. (emphasis added).<sup>58</sup> As the district court observed, J.S. App. 63a, "it strains credulity to translate the statement 'reference is made . . . to the use of sampling procedures' into 'sampling procedures may now be used' . . . for congressional apportionment, thereby abandoning the long-standing methodology by which we count people."

2. Despite this history, Intervenor's contend that

<sup>58</sup> The Senate Report states that the new language was "added at the end of the subsection to encourage the use of sampling and surveys in the taking of the decennial census," confirming that its purpose was to promote the use of existing authority, not to convey new authority to conduct the constitutional enumeration by sample survey. S. Rep. No. 94-1256, at 4 (emphasis added). The House Report never even mentions the rewording of § 141(a) despite a detailed "Section Analysis" of many minor changes. H.R. Rep. No. 94-944, at 5-6 (detailing no less than 16 changes to title 13 including substitution of "questionnaires" for "schedules").

"Congress was well aware" of the Bureau's anomalous use of statistical sampling in the 1970 census, approved of that violation of § 195, and included amendments to the Act in 1976 "to conform more properly and closely to the current language and practices used by the Bureau of the Census." Gephardt Br. 30-31 & n.20 (citing S. Rep. No. 94-1256). The Senate Report, however, specifically identifies the "technical changes" proposed for the purpose of "conform[ing] . . . the current language" of the Act to the "practices used by the Bureau of the Census." S. Rep. No. 94-1256, at 6. The amendments to §§ 141(a) and 195 are not described in those terms.<sup>59</sup> Nor is there any suggestion in any of the hearings, reports, or debates that the 94th Congress, which enacted the amendments at issue, had any knowledge whatsoever of the Bureau's limited use of sampling under exigent circumstances six years earlier. *See supra* at 42-44. *See generally* Brief of Washington Legal Foundation, *et al.* ("WLF Br").

Intervenor's also suggest that perhaps no one in Congress mentioned that it was eliminating the prohibition on sampling in 1976 because members of Congress at that time would not have viewed the use of sampling for apportionment as "important or controversial." Gephardt Br. 12. We know, however, that issues with any potential to affect apportionment captivated the attention of Congress then as well as now: concerns about possible "use of mid-decade census statistics for congressional apportionment and districting" prevented passage of legislation authorizing a mid-decade census for more than a decade. *See* H.R. Rep. No. 94-944, at 17; *Proposals for a Mid-Decade Census, Hearing before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service, 94th Cong., 1st*

<sup>59</sup> *See* S. Rep. No. 94-1256, at 3-7 (describing in detail six separate amendments designed to conform the language to Bureau practices). *See also* 1976 Senate Hearing at 24-32 (letter from Appellants identifying sections of the bill -- which do not include the amendments to §§ 141(a) or 195 -- that will conform the language of the Act to the Bureau's practices).

Sess. 3 (May 16, 1975). The House Report underscored this concern by emphasizing that "this legislation will not affect apportionment or districting of Congressional seats." H.R. Rep. No. 94-944, at 4; *accord* 122 Cong. Rec. 9792 (Apr. 7, 1976) (explanation by the sponsor of the House bill).<sup>60</sup>

### III. THE CONSTITUTION FORBIDS THE SECRETARY FROM USING SAMPLING FOR APPORTIONMENT

The Census must be conducted in a manner that is "consistent" both with "the constitutional goal of equal representation," and "the constitutional language." *City of New York*, 517 U.S. at 19-20. Appellants' program to use statistical sampling may or may not be consistent with equal representation, but it is surely not consistent with the constitutional language that requires the population to be determined for apportionment purposes by way of an "actual Enumeration," U.S. Const. Art. I, § 2, cl. 3. Appellants protest that the Framers did not spell out in their debates what they meant by "actual Enumeration," but the Framers had no need to do so — the language was unambiguous. It meant counting, and excluded "estimation." At any rate, interpreting the "actual Enumeration" as a headcount of the population comports with the Framers' preference for a verifiable, objective standard. It is also consistent with historic prac-

<sup>60</sup> Nor is there any merit to the claim that broad delegations of new authority to the Secretary were so routine as to be unremarkable. See, e.g., *Mid-Decade Census, Hearings Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service* 24, 90th Cong., 1st Sess. (Apr. 25 & 26, 1967) (statement of Committee Member advising a Bureau official that "I am not prepared to support any bill that just gives blanket authority" to the Executive Branch). Indeed, even the issue of developing techniques to adjust census results for funding purposes was described as "one of the most political issues." *1980 Census, Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 94th Cong., 2d Sess. 1 (June 1 & 2, 1976). Contrary to Intervenor's claims, the hearings concerning the 1980 census support the district court's interpretation. See generally WLF Br.

tice. Since 1790 Congress has directed those responsible for the census to take it by counting the people.

#### A. The Plain Text Of The Census Clause Precludes The Use Of Sampling

At the time of the Constitutional Convention, "actual Enumeration" had a plain meaning: To "enumerate," according to Samuel Johnson, was to "reckon up singly" or "count over distinctly." *A Dictionary of the English Language* (4th ed., 1773); *accord*, e.g., Thomas Sheridan, *A Complete Dictionary of the English Language* (1784); John Walker, *A Critical Pronouncing Dictionary* (1794); Richard Wiggins, *The New York Expositor* (1822). Similarly, Noah Webster wrote that "to enumerate" meant "[t]o count or tell, number by number; to reckon or mention a number of things, each separately." *I An American Dictionary of the English Language* (New Haven, S. Converse, 1828).<sup>61</sup> "Enumeration" constituted the act of "counting or telling a number, by naming each particular," *id.*, or "numbering or counting over," Sheridan, *supra*. Thus, enumeration described a process distinct from estimation, requiring a count of the people.<sup>62</sup> The word "actual" also had a clear and unambiguous meaning. It meant "really in act," as opposed to "purely

<sup>61</sup> Contrary to Appellants' understanding below (D.E. 45, at 18), an enumeration is accomplished by enumerating. Placing the suffix "-tion" at the end of a verb does not change the root meaning of the term; it only converts the verb into a noun. See *The Dictionary of Etymology* 816 (Robert K. Barnhart ed., 1995) (defining "-tion" as a "suffix forming nouns from verbs, and meaning the act or process of \_\_\_\_\_ing, as in addition"); *accord Suffixes and Other Word-Final Elements of English* 214 (Laurence Urdang, et al., ed., 1982).

<sup>62</sup> The Solicitor General used to appreciate the difference. In his argument to this Court in *Franklin*, the Deputy Solicitor General explained that when the Secretary included armed forces abroad in the census: "an enumeration is exactly what took place . . . . The Secretary didn't estimate the number of servicepeople abroad. [He] didn't take a sample and then extrapolate from that. The Secretary counted them." 1992 U.S. Trans. LEXIS 212, at \*4-\*5.



in speculation." Johnson, *supra*; Sheridan, *supra*. When the Framers used the term "actual Enumeration," therefore, they anticipated a procedure by which the government would actually "count" or "reckon-up" the people, one by one.<sup>63</sup>

In Appellants' view, because the Constitution vests Congress with the duty to direct the "Manner" in which the "actual Enumeration" is made, an "actual enumeration" means no more than the "action of ascertaining an official count of the number of persons who exist," and the "manner" of ascertaining that official count is entirely up to Congress or its delegate. Br. 40-41. Appellants are mistaken in this. Had the Framers intended to leave the manner of determining the population entirely up to Congress, they could have used more general language.<sup>64</sup> They chose, however, to require Congress to make an "actual Enumeration." Appellants' invocation of Congress's duty to direct the manner in which this enumeration is conducted merely begs the question of what the Framers meant by an actual enumeration.

<sup>63</sup> As Art. I, § 9, cl. 4 of the Constitution suggests, "census" was synonymous with "enumeration of inhabitants." See Noah Webster, *A Compendious Dictionary of the English Language* (New Haven, S. Press, 1806); II *The Records of the Federal Convention of 1787* at 618 (Max Farrand ed., 1911) ("*Federal Convention*") (enumeration inserted as "explanatory of Census"). "Census" derives from the Latin word "censere," which means to count or reckon. 14 Am. Jur. 2d *Census* § 1 (1964).

<sup>64</sup> See, e.g., *Documentary Source Book of American History: 1606-1926*, at 47 (William MacDonald ed., 1926) (Article IV of the New England Confederation required apportionment according to a "true, and just account" of the numbers within each jurisdiction); *The Papers of James Madison* 27-28 (A. Longtree ed., 1840) (first draft of Articles of Confederation required a "true account" of the "number of inhabitants" to apportion the costs of government)).

## B. The Ratification History Supports the Plain Meaning Of The Text

Neither Appellants, nor Intervenor, nor their amici have come forward with any evidence that the Framers intended to permit the use of estimation techniques to determine the population for purposes of apportionment. Instead, they argue that the Framers could not have cared *how* the population would be determined, because they devoted little discussion to this issue. Appellants' Br. 42; see also, e.g., L.A. Br. 39-40. The Constitution's text should be accorded its plain meaning, however. The Framers unquestionably understood the difference between estimating the population and counting it,<sup>65</sup> and if they had intended to permit Congress to estimate the population for purposes of apportionment, they were more than capable of using language to that effect.<sup>66</sup> Their choice of language that instead forbids estimation should not be dismissed as sloppy drafting.<sup>67</sup>

<sup>65</sup> The colonies often relied on estimation techniques based, *inter alia*, on polling lists, militia returns, and the number of homes. See James H. Cassedy, *Demography in Early America: Beginnings of the Statistical Mind, 1600:1800*, at 72, 73 (1969); Evarts B. Greene and Virginia D. Harrington, *American Population Before the Federal Census of 1790*, Note on Methods of Calculation xxiii (1932); see generally Patricia C. Cohen, *A Calculating People: The Spread of Numeracy in Early America* 47-76 (1982). In 1782, Thomas Jefferson estimated the population of Virginia based on limited data and specific assumptions about the Commonwealth's demographics. Thomas Jefferson, *Notes On the State of Virginia* 82-87 (William Peden ed., 1955). Jefferson is thought to have underestimated Virginia's population by only one or two percent. Alterman, *supra*, at 168-70.

<sup>66</sup> See, e.g. Article VIII of the Articles of Confederation, in *Documentary Source Book of American History: 1606-1926*, *supra*, at 199 ("All charges of war . . . shall be defrayed out of a common treasury . . . in proportion to the value of all land within each State [which] shall be *estimated*") (emphasis added).

<sup>67</sup> The Convention initially approved and referred to the Committee of Detail a resolution that "a Census be taken . . . in the manner and according to the ratio recommended by Congress in their resolution of April 18, 1783." I *Federal Convention* at 591 (July 12, 1787); II *Federal Convention*

At any rate, the ratification history reinforces the plain meaning of the text. The records of the Convention demonstrate that, although the Framers accepted out of necessity the "conjectural ratio" by which membership in the House was initially apportioned, they inscribed in the Constitution "permanent & precise standard[s]" to govern the reapportionment of political power among the States in order to protect against political intransigence, maneuver, and manipulation. I *Federal Convention* at 578. The census was required to be taken every ten years, rather than whenever Congress might deem fit, because the Framers understood that "those who have power in their hands will not give it up while they can retain it." *Id.* Responsibility for conducting the census was placed in the hands of the national legislature, the States "be[ing] too much interested to take an impartial one for themselves." *Id.* at 580. And the census was made the "common measure for representation and taxation" to produce in the States — which would undoubtedly have a hand in the process — the "requisite impartiality." *The Federalist* No. 54, at 371-72 (Madison) (Jacob E. Cooke ed., 1961). Finally, the Framers adopted the fixed, objective standard of an "actual enumeration" to reduce the scope of potential disputes and minimize the opportunity for political manipulation.<sup>68</sup>

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at 14 (July 16, 1787). Appellants emphasize (Br. 43) a subsequent version of the clause, drafted by the Committee of Detail, which would have required the Legislature to "take[] the number" of inhabitants in each State. Appellants insist this interim version of the Census Clause — not the final version prepared by the Committee on Style that was approved by the Convention and ratified, and that uses the words "actual Enumeration" — should govern. This Court squarely rejected that method of interpretation in *Nixon v. United States*, 506 U.S. 224, 231-32 (1993), because it would require the courts to apply "the second to last draft [of the Constitution] in every instance where the Committee on Style added an arguably substantive word." The Court presumed that the Committee of Style's "rephrasing accurately captured what the Framers meant." *Id.*

<sup>68</sup> The Framers' preference for the objectivity afforded by a precise count is reflected in their debates over the use of wealth as a basis for

Appellants protest (Br. 47) that the Framers also cared about obtaining an accurate determination. Of course they did, but the Framers sought to achieve an accurate result by requiring an actual enumeration. "The prescription of the written law cannot be overthrown" because Appellants have a new way of determining the population that they believe will be more accurate than the method required by the Framers. *McPherson v. Blacker*, 146 U.S. 1, 36 (1892).

### C. Long-Standing Historical Practice Confirms The Plain Meaning Of The Text

The Framers understood from colonial experience that counting the people would be hard. Madison acknowledged from the outset the inherent "difficult[ies] attendant on the taking of the census, in the way required by the constitution." 13 *The Papers of James Madison* 15 (Hobson and Rutland ed., 1962). Presidents Washington and Jefferson were convinced that the first census substantially undercounted the nation's population. See *Baldrige v. Shapiro*, 455 U.S. 345, 353 n.8 (1982). As today, moreover, the undercount was thought to affect certain regions more than others. See *supra* at 1-2. Yet, no one suggested that Congress "augment" the census with statistical estimation, however accurate. Congress's failure to employ what would appear to have been a "highly attractive power" affords "reason to be-

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representation. Although most delegates believed that wealth should be taken into account in apportionment, e.g., I *Federal Convention* at 204-06, 578-88, the use of wealth as a measure of power was considered problematic, because it would have "requir[ed] of the Legislature something too indefinite & impracticable." *Id.* at 582 (statement of George Mason); *accord id.* at 561 (estimates of combined wealth and population would be "too vague") (statement of William Patterson); *id.* at 587, 605 (preferring population count to an attempt to "estimate [wealth] by numbers") (statement of Roger Sherman). The Framers ultimately decided to rely solely on the population count (see *id.* at 587, 605), which, although not a perfect indicator of wealth, provided a precise, objective, and verifiable measure.



lieve that the power was thought not to exist." *Printz v. United States*, 117 S. Ct. 2365, 2370 (1997).

Appellants do not seriously dispute the House's description of the legislation and historical practices that governed the census through the mid-twentieth century.<sup>69</sup> They argue, instead, that the enumerators in those censuses did not "count singly," because until 1850 the individuals in each household were grouped by family name, and because the numbers for each household were supplied by a single family member or neighbor. Br. 47-49. These arguments are specious. Whether the census tracked each individual by name has nothing to do with whether it determined the population by counting the number of individuals. And irrespective of whether the census taker personally counted the individuals in a household, or instead relied on a family member or neighbor, the tally was in any event derived from counting, not statistical estimation.

### CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

<sup>69</sup> Appellants observe (Br. 48) that the Bureau has in the last few decades used a statistical methodology known as "imputation" in circumstances where an enumerator knows that particular housing units are occupied, but cannot determine how many persons live there. Rather than treat these units as ones with no occupants, the Bureau has assigned to each such unit the number and characteristics of another housing unit on the same block. 53,599 persons were added to the 1990 census on the basis of this method. J.A. 82. In contrast to Appellants' sampling plan, imputation has been applied only as a last resort and always with respect to a specific housing unit based on physical evidence that the unit is occupied. See, e.g., *The Decennial Census Improvement Act, Hearing before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 100th Cong., 2d Sess. 73 (Mar. 3, 1988). Accordingly, it presents far less opportunity for manipulation than sampling used to determine the population at tract, district, and state levels. In any event, the Bureau's use of imputation in a few recent censuses has no bearing on the meaning of "actual Enumeration." See *Powell*, 395 U.S. at 547 ("Obviously, . . . the precedential value of [historical practices] tends to increase in proportion to their proximity to the Convention in 1787").

Respectfully submitted,

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**APPENDIX**



## APPENDIX

Section 5 of Title 13, United States Code, provides as follows:

The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.

Section 181(a) of Title 13, United States Code, provides as follows:

(a) During the intervals between each census of population required under section 141 of this title, the Secretary, to the extent feasible, shall annually produce and publish for each State, county, and local unit of general purpose government which as a population of fifty thousand or more, current data on total population and population characteristics and, to the extent feasible, shall biennially produce and publish for other local units of general purpose government current data on total population. Such data shall be produced and published for each State, county, and other local unit of general purpose government for which data is compiled in the most recent census of population taken under section 141 of this title. Such data may be produced by means of sampling or other methods, which the Secretary determines will produce current, comprehensive, and reliable data.

Section 193 of Title 13, United States Code, provides as follows:

— In advance of, in conjunction with, or after the taking of each census provided for by this chapter, the Secretary may make surveys and collect such preliminary and supplementary statistics related to the main topic of the census as are necessary to the initiation, taking, or completion thereof.



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**In the Supreme Court of the United States**

OCTOBER TERM, 1998

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UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
APPELLANTS

*v.*

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**REPLY BRIEF FOR THE APPELLANTS**

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## REPLY BRIEF FOR THE APPELLANTS

The Constitution provides that Representatives shall be apportioned among the States "according to their respective Numbers." U.S. Const. Art. I, § 2, Cl. 3; U.S. Const. Amend. XIV, § 2. To effectuate that constitutional command, the Census Clause directs that an "actual Enumeration" of the population must be made at least once within every ten-year period. U.S. Const. Art. I, § 2, Cl. 3. That Clause states that the enumeration may be conducted "in such Manner as [Congress] shall by Law direct," *ibid.*—language that "vests Congress with virtually unlimited discretion," *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). Congress in turn "has delegated its broad authority over the census to the Secretary" of Commerce, *ibid.*, by directing the Secretary to "take a decennial census of population \* \* \* in such form and content as he may determine," 13 U.S.C. 141(a).

Based on abundant scientific evidence and the opinions of numerous experts and panels, the Census Bureau has determined that the use of statistical sampling mechanisms in the 2000 census will improve the accuracy of the state-level population counts that will be used in apportioning Representatives among the States. The House of Representatives does not contest that determination. The House nevertheless contends that the use of sampling for apportionment purposes is barred by both the Constitution and the Census Act, despite the sweeping grants of authority described above, and despite the fact that the Act specifically authorizes the use of "sampling procedures" in the conduct of the decennial census. The House's claims should be rejected, both because the House lacks any judicially cognizable interest in the issue, and because the Bureau's plan for the 2000 census falls well within its lawful sphere of discretion.



**A. The House of Representatives Lacks Standing To Bring This Suit**

1. Contrary to the House of Representatives' contention (Br. 12-18), the Commerce Department's plan for the 2000 census imposes no actual or imminent "informational injury" upon the House. The House does not seek to compel the production of information already in the possession of the Executive Branch defendants. Compare *McGrain v. Daugherty*, 273 U.S. 135 (1927). Nor does it seek to compel them to procure information currently in the possession of a private party. Compare *FEC v. Akins*, 118 S. Ct. 1777 (1998). Rather, the purpose of the instant suit is to effect a fundamental alteration in the methodology by which the Commerce Department plans to conduct the 2000 census. The fact that one consequence of the district court's order would be the furnishing of different population figures to Congress is not a sufficient basis for concluding that the House has a judicially cognizable "informational" interest in the case.<sup>1</sup>

The House of Representatives contends (Br. 14-16) that it must receive state-level population totals derived without the use of sampling in order to decide intelligently whether the current statutory apportionment formula (the method of equal proportions, see 2 U.S.C. 2a(a); *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 451-455 (1992)) should be changed. That asserted basis for standing is farfetched.

<sup>1</sup> The relief requested by the House and awarded by the district court goes well beyond an order directing the Commerce Department to provide Congress with state-level population figures derived without the use of sampling. Rather, the effect of the court's order is to require that figures produced without the use of sampling must be certified by the President as the official state-level totals pursuant to 2 U.S.C. 2a(a). As we explain in our opening brief (at 21 & n.10), the evident purpose of such relief is to achieve the current House's policy objectives without the passage of any new law—not to facilitate future legislative activity.

Although Congress undoubtedly retains authority to enact a new law adopting a different apportionment formula, see *Montana*, 503 U.S. at 463-465, the House offers no basis for believing that such legislative action is likely to occur in the foreseeable future. Nor is there any reason to suppose that a particular set of state-level population figures for the year 2000 would be necessary or even useful to any principled legislative reconsideration of the equal proportions formula. Indeed, the premise of the House's argument—i.e., that it can intelligently choose among possible apportionment formulas only if it knows the effect of each formula on the 2001 apportionment of Representatives among the States—is inconsistent with the House's purported determination to prevent political manipulation of the census.<sup>2</sup>

2. Relying on *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), the House of Representatives argues (Br. 18-21) that it possesses a judicially cognizable

<sup>2</sup> As the House points out (Br. 14), Congress's practice for much of the country's history was to enact a new apportionment law after each decennial census. Congress abandoned that practice in 1941, however, by adopting a permanent, self-executing apportionment formula and thereby obviating the need for the frequently acrimonious disputes that had previously characterized the apportionment process. See Comm. Dep't Br. 3 n.1. Although the Constitution does not preclude Congress from resuming its earlier practice, the House has not pointed to any meaningful likelihood that Congress will choose to do so.

The House also suggests (Br. 13 & n.13) that it might use population figures derived without the use of sampling in order to determine the qualifications of potential Members elected after the 2001 apportionment. The existing reapportionment statute, however, unambiguously provides that "[e]ach State shall be entitled \* \* \* to the number of Representatives shown in the statement" transmitted by the President to Congress. 2 U.S.C. 2a(b) (Supp. II 1996). The House identifies no authority suggesting it could refuse to seat Members elected in accordance with the apportionment mandated by law. The precedents cited by the House (see Br. 13 n.13) involved situations in which a State was found to have elected Representatives in excess of the number allotted by statute.

interest in its "lawful composition." The House's reliance on *Beens* is misplaced. The district court judgment under review in that case would have fundamentally altered an existing legislative body by, *inter alia*, requiring that the number of senatorial districts within the State be reduced from 67 to 35. See 406 U.S. at 188-193. By contrast, the Census Bureau's plan for the 2000 census can have no effect whatever upon the House of Representatives until the 108th Congress convenes in the year 2002. See Comm. Dep't Br. 24-25 n.12. Even at that time, the House will be composed of 435 Members regardless of whether sampling is employed in the 2000 census. Although the use of sampling might affect the number of Members chosen from several States, and thus the identities of some individual Members of the House, any such effects would have no impact on the vast majority of States and Members and would impose no injury on the House as a corporate body.<sup>3</sup> There is, moreover, no reason

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<sup>3</sup> The apparent premise of the House's argument is that any violation of law affecting the identity of a single Member causes the House to be unlawfully composed. In a variety of circumstances, however, the manner in which individual Representatives are seated (or unseated) has been found to have been tainted by constitutional error. See, e.g., *Bush v. Vera*, 517 U.S. 952 (1996) (manner in which State considered racial factors in drawing congressional districts violated the Equal Protection Clause); *Karcher v. Daggett*, 462 U.S. 725 (1983) (State violated Article I, Section 2 by failing to draw congressional districts that were as nearly equal in population as practicable); *Powell v. McCormack*, 395 U.S. 486 (1969) (House of Representatives violated Article I, Section 5 by refusing to seat an elected Representative who possessed the constitutional qualifications). It seems to us a very dubious proposition—and one that scarcely serves the continuing interests of the House—to suggest that such infirmities in the selection of individual Members cast doubt on the "constitutional character" (House Br. 19) of the entire House of Representatives.

Although the House asserts (Br. 27) that "the Secretary's decisions [regarding statistical sampling] could have an enormous impact on the apportionment of Representatives in Congress," the statistical adjustment

to assume that the House of Representatives for the 108th Congress—a body that will be composed of individuals who have won election based on the 2001 apportionment—will regard itself as being unlawfully composed.<sup>4</sup>

3. In our opening brief, we explain (at 24) that intra-governmental disputes concerning the respective prerogatives of the political Branches have traditionally been regarded as insusceptible of judicial resolution. The precedents cited by the House of Representatives (see Br. 23-24 & nn. 28-29) do not refute that proposition. Those cases involved either (a) disputes between a governmental entity and a government official litigating in his individual capacity, see, e.g., *United States v. Will*, 449 U.S. 200 (1980), or (b) disputes whose resolution would have concrete effects on a private actor who was a party to the case, see, e.g., *INS v. Chadha*, 462 U.S. 919, 939-940 (1983). As *Chadha* and subsequent decisions (see, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986)) make clear, the courts may appropriately resolve legal issues as to which the political Branches disagree in the course of determining "the rights of individuals," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992). The fact that such suits are justiciable *despite* the existence of inter-Branch conflict does not mean, however, that an inter-Branch disagreement is itself a sufficient basis for the exercise of jurisdiction by an Article III court.

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considered (and ultimately rejected) in 1991 would have caused a shift of no more than two seats. See 94-1614 Gov't Br. 18-19 (*City of New York*).

<sup>4</sup> The current House of Representatives' entitlement to sue on behalf of future Houses is particular tenuous with respect to its claim under the Census Clause. The House seeks a decision of this Court that would preclude any future Congress from requiring or authorizing any census methodology other than a headcount, even if Congress affirmatively concludes that the use of statistical sampling is appropriate. Whatever the merits of the House's constitutional theory, the long-term interests of the House are unlikely to be served by such a decision.



At bottom, a majority of the Members of the House simply disapprove of the way in which the Secretary of Commerce intends to execute an existing law (the Census Act). It is to the President, however, not to the Congress (or to the courts acting at Congress's behest), that the Constitution assigns the power to "take Care that the Laws be faithfully executed." Art. II, § 2, Cl. 3; see *Lujan*, 504 U.S. at 577. Congress's disagreement with the Secretary's decision, "no less than Congress' original choice to delegate to the [Secretary] the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage [of a bill] followed by presentment to the President." *Chadha*, 462 U.S. at 954-955.

**B. Any Census Methodology Will Produce An Estimate Of The "Respective Numbers" Of "The Several States"**

A recurring theme in the House of Representatives' brief is the assertion that the decennial census has traditionally involved an effort to "count" the numbers of people within the various States, and that the Census Bureau plans to depart from that tradition in the year 2000 by "estimating" those numbers instead. See House Br. 11, 31, 33, 44, 45, 47, 50. As we explain in our opening brief (at 47-49 & n.29), the Census Bureau has repeatedly used techniques that cannot plausibly be regarded as a "headcount" of identified individuals. But even if those techniques were abandoned, the population figures transmitted to Congress pursuant to 2 U.S.C. 2a(a) would be estimates of the actual numbers of persons in each State. The choice facing the Census Bureau and this Court concerns the appropriate method of estimating the population, not whether to estimate at all.<sup>5</sup>

<sup>5</sup> The Secretary of Commerce is required to "take a decennial census of population as of the first day of April of [the census] year." 13 U.S.C. 141(a). Persons identified during the census, however, are not automatically allocated to the State in which they are physically present on the census date. Rather, persons have historically been allocated among the

The purpose of the decennial census is to determine the number of persons actually residing within each State in order to effectuate the constitutional directive that "Representatives \* \* \* shall be apportioned among the several States \* \* \* according to their respective Numbers." U.S. Const. Art. I, § 2, Cl. 3. It is universally recognized, however, that the actual populations of the States cannot be determined with absolute precision. The census methodology advocated by the House of Representatives—i.e., ascertaining the numbers of persons within each State who can be specifically located and identified—will produce only an approximation of the numbers of persons actually residing within the States, not an exact count thereof.<sup>6</sup> The question before the Court is whether the Census Act or the Constitution requires the Bureau to employ that particular

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States based on their "usual residence" as of that date. See *Franklin v. Massachusetts*, 505 U.S. 788, 803-806 (1992). The term "usual residence" connotes "more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." *Id.* at 804. In applying the concept of "usual residence," the Census Bureau has historically employed rules of general applicability rather than undertaking an individualized inquiry into the subjective loyalties or expectations of each person within the relevant categories. Thus, a high school student attending boarding school is allocated to the State in which his parents reside. See *id.* at 806. The same rule applied to college students until 1950, when the Bureau adopted its current practice of allocating those students to the States where they attend college. See *id.* at 805-806; 91-1502 J.A. 178, 219 (*Franklin*). For most of the country's history, overseas federal employees were not allocated to any State; but for the 1990 census each such person was allocated to the "home of record" identified in his personnel file. *Franklin*, 505 U.S. at 792-795. Thus, even with respect to individuals who are specifically identified on census forms, an element of generalization or estimation is built into the process by which individuals are allocated to particular States.

<sup>6</sup> As the Census Bureau's *Report to Congress* explains, "Census takers have never been able to contact and count each and every resident of this nation. As a result, information on less than the whole population has always been used to characterize the whole population." J.A. 81.

method of approximating the actual population—not whether the Act or the Constitution prohibits estimation as such.<sup>7</sup>

**C. 13 U.S.C. 141(a) Grants The Secretary Broad Discretion And Specifically Authorizes The Use Of Sampling**

The House of Representatives suggests that the Secretary's claim of authority to use sampling for apportionment purposes is anomalous—contrary to the spirit or overall structure of the Act—and that any ambiguity in 13 U.S.C. 195 should therefore be resolved so as to preclude the use of sampling. See, e.g., House Br. 32-33. The Census Act provision that deals specifically with the decennial census of population, however, authorizes the Secretary to take that census “in such form and content as he may determine, including the use of sampling procedures.” 13 U.S.C. 141(a). Section 141(a) establishes as the operative background rule that the Census Bureau may employ whatever means it believes will increase the accuracy of the state-level population counts used in the apportionment process.

The Secretary's express authority to use “sampling procedures” is thus simply one aspect of his power to conduct the decennial census “in such form and content as he may determine”—language by which “Congress has delegated its broad authority over the census to the Secretary.” *City of New York*, 517 U.S. at 19. Congress's decision to confer that broad authority does not preclude the possibility that other

<sup>7</sup> In common usage, a person who is instructed to “count” the number of persons or objects at a particular location, and who is specifically told that an “estimate” is not sufficient, would likely conclude that the instruction reflected a desire for a precisely accurate number. That distinction loses its significance, however, in situations (like the decennial census of population) where precise accuracy is unattainable. The House's use of the terms is particularly unusual because the Census Bureau's plan for the 2000 census is grounded in the determination that population figures derived through the use of sampling—figures that the House disparages as mere “estimates”—will *more accurately* reflect the actual populations of the States than will figures produced without sampling.

Census Act provisions bar the use of sampling for apportionment, even where the Secretary has reasonably concluded that sampling will improve the accuracy of the state-level population counts. Contrary to the House's suggestion, however, such a prohibition would be a unique exception to Congress's general approach to the decennial census.

**D. 13 U.S.C. 195 Has Never Functioned As A Prohibition On The Use Of Sampling For Apportionment Purposes**

As the House of Representatives recognizes (Br. 34-35), the Census Act imposed significant barriers to the use of statistical sampling prior to the enactment of Section 195 in 1957. First, the Commerce Department and Congress understood the statutory term “census” to contain an implicit requirement of a “complete enumeration” rather than a “sample survey.” See *Amendment of Title 13, United States Code, Relating to Census: Hearing on H.R. 7911 Before the House Comm. on Post Office and Civil Service*, 85th Cong., 1st Sess. 7-8 (1957); H.R. Rep. No. 1043, 85th Cong., 1st Sess. 10 (1957); Comm. Dep't Br. 33-35. Second, former 13 U.S.C. 25(c) (Supp. IV 1952) required each Census Bureau enumerator to “visit personally each dwelling house in his subdivision.” The effect of Section 195's opening proviso was that those pre-existing barriers remained in place with respect to the apportionment of Representatives among the States. But Section 195 was not itself a prohibition on the use of sampling for apportionment purposes. Rather, Section 195 is *and has always been* irrelevant by its terms to the apportionment process. See Comm. Dep't Br. 33-39.<sup>8</sup>

<sup>8</sup> The legislative history of the 1957 Census Act amendments suggests that Congress at that time did not foresee the use of sampling as a technique to supplement rather than to replace efforts to contact all residents directly. See Br. for Intervenor Gephardt, et al. 8-9, 33-35. That form of sampling might well have been permissible, even for purposes of apportionment, at the time Section 195 was originally enacted.



Focusing on the 1976 amendment to Section 195, the House of Representatives contends that Congress would not have eliminated the earlier sampling prohibition "casually" or "inadvertently" (Br. 33) or in "an oblique fashion" (Br. 37). But when the original statutory barriers to sampling have been accurately identified, the House's point is demonstrably without force. Congress eliminated those barriers to sampling in the most direct and unambiguous way possible. It repealed former Section 25(c) in 1964. See Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737. And insofar as the word "census" was thought implicitly to have barred or limited the use of sampling for apportionment purposes, any such implication was eliminated by the 1976 amendment to 13 U.S.C. 141(a), which specifically authorized the Secretary to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures." See Comm. Dep't Br. 37-39.<sup>9</sup>

The House contends (Br. 36 n.49) that no plausible "intermediate position" exists, or has ever existed, because Section 195 itself draws no distinction between sampling used to supplement traditional enumerative techniques and sampling used in their stead. As we explain above and in our opening brief, however, the statutory barriers to sampling that existed immediately after the enactment of Section 195 were imposed by the then-current understanding of the word "census" and by former Section 25(c), not by Section 195 itself. It is by no means clear that those pre-existing statutory barriers would have precluded the use of statistical sampling as a supplement to good-faith efforts by the Census Bureau to contact all residents directly. See Comm. Dep't Br. 36-37 n.19.

The Bureau's plan for the 2000 census includes an exhaustive effort to mail questionnaires to all of the country's known households; to make questionnaires available in public places; and to encourage public participation by advertising and other outreach methods. See J.A. 73-80; 98-564 J.A. 102-104. Contrary to the House's contention (Br. 36 n.49), the sampling contemplated for the 2000 census will therefore supplement, rather than substitute for, a good-faith effort to contact all residents directly.

<sup>9</sup> The Census Bureau made extensive use of sampling during the 1970 census. See Comm. Dep't Br. 49 n.29; J.A. 82. Congress passed the

The House's brief is almost entirely unresponsive to the foregoing analysis. The House asserts (Br. 35-36) that Section 195 as originally enacted "unequivocally \* \* \* prohibited the Secretary from using sampling to determine the population for purposes of apportionment." The sole authorities it offers for that proposition, however, are two committee reports, each of which states only that Section 195 *did not authorize* the use of sampling in connection with the apportionment process. See House Br. 36 n.47; Comm. Dep't Br. 34-35. The fact that Section 195 provided no affirmative authorization for sampling in the apportionment process does not suggest that Section 195 itself prohibited such uses of sampling. Nor is there any merit to the House's assertion (Br. 36) that "[i]rrespective of whether the proviso in § 195 was a 'freestanding' prohibition when it was enacted, it clearly was a freestanding prohibition after Congress eliminated § 25(c) in 1964 to permit the Bureau to take the census by mail." If our reading of Section 195 in its original form is correct—*i.e.*, if the original purpose and effect of Section 195's opening proviso was to render that Section irrelevant to apportionment, leaving the use of sampling for apportionment purposes to be governed by other, pre-existing Census Act provisions—the subsequent repeal of Section 25(c) could not plausibly be thought to transform the proviso into a prohibition.<sup>10</sup>

express authorization of sampling in Section 141(a) in the wake of that experience, see Br. for Intervenor California Legislature 16-20, and that change was one of a number designed "to conform more properly to the current language and practices used by the Bureau of the Census," S. Rep. No. 1256, 94th Cong., 2d Sess. 1 (1976). See *id.* at 4 ("New language is added at the end of [Section 141(a)] to encourage the use of sampling and surveys in the taking of the decennial census.").

<sup>10</sup> As the House correctly points out (Br. 24-27), the Census Bureau and the Department of Justice have previously expressed views regarding the interpretation of Section 195 that are not consistent with our position in this case. In 1980, the Census Bureau asserted that Section 195

precluded statistical adjustment of population figures to be used in the apportionment process, and the Department of Justice defended that position in litigation, unsuccessfully. Subsequent Department of Justice opinions have concluded that Section 195 does not prohibit the use of sampling as a supplement to traditional enumerative techniques, but have suggested that Section 195 does prohibit the Bureau from using sampling for apportionment purposes as a substitute for good-faith efforts to contact all residents directly. Our position throughout the current litigation has been that Section 195 has no prohibitory effect whatever; its opening proviso renders that Section altogether irrelevant to apportionment, leaving the propriety of sampling in that context to be governed by other provisions of law.

It can hardly be contended, however, that the Census Bureau's current understanding of the applicable law represents the abandonment of a previously settled legal position. The Bureau made extensive use of sampling techniques during the 1970 census. See note 9, *supra*. And although the Secretary of Commerce ultimately decided not to employ a statistical adjustment of the 1990 census figures, he made clear that his decision did not rest on a determination that either the Census Act or the Constitution precluded an adjustment. See Comm. Dep't Br. 4-5 n.2. Indeed, the Director of the Census Bureau recommended in favor of the proposed adjustment. See 94-1614 J.A. 68-94 (*City of New York*).

Because the statutory analysis set forth in our briefs in this case is concededly a departure from prior Commerce and Justice Department positions, we have not invoked the principle that the Secretary's interpretation of the Census Act is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Section 141(a) does, however, expressly (and broadly) confer on the Secretary the authority to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures." And the *Report to Congress* and the Census 2000 Operational Plan, which are by statute the subject of this lawsuit (see Comm. Dep't Br. 9), obviously represent the Secretary's formal position that the sampling he contemplates is lawful. Moreover, insofar as the propriety of the Bureau's plan for the 2000 census depends on subsidiary technical and policy questions—*e.g.*, whether sampling is likely to enhance the accuracy of the population counts, or whether sampling renders the census more or less susceptible to political manipulation—the agency's views on those issues warrant deference from this Court. See *City of New York*, 517 U.S. at 23.

### E. Congress Did Not Prohibit Sampling In Order To Prevent "Political Manipulation"

The Census Bureau's decision to employ statistical sampling in the 2000 census was principally based on its determination—supported by a wealth of scientific evidence—that the use of sampling will enable the Bureau to determine more accurately the actual populations of the United States and its political subdivisions. See Comm. Dep't Br. 5-8; 98-564 Gov't Reply Br. 1-9. The House of Representatives does not challenge the Bureau's conclusion that sampling will improve the accuracy of those population counts. Rather, the House contends that sampling will increase the danger of "political manipulation" (Br. 33, 48); and it suggests that in enacting 13 U.S.C. 195, Congress chose to prohibit the use of sampling in connection with apportionment in order to eliminate the risk of such manipulation (Br. 33). Those arguments do not withstand scrutiny.

1. As the *Report to Congress* explains, "[e]very effort has been made to ensure the independence and integrity of the decisions by the professional statisticians at the Census Bureau" in connection with the 2000 census. J.A. 128; see J.A. 128-132. After review of and comment on its plan for the 2000 census by the public and the professional statistical community, "the Census Bureau will announce and 'lock in' its final set of formulas—well in advance of the collection of any data in 2000." J.A. 132. By making all significant methodological decisions before census data are collected, the Bureau will avoid replication of the choice that confronted Secretary Mosbacher in July 1991, when he was required to determine whether census figures would be statistically adjusted at a time when the effects of an adjustment on individual States and localities were precisely known. See *2000 Census: Progress Made on Design*, but



*Risks Remain*, GAO/GGD-97-142, at 60, 76 (July 1997).<sup>11</sup> The House's argument also incorrectly assumes that non-sampling methods present no opportunity for manipulation of the census process. In fact, a census conducted without sampling requires a host of discretionary decisions concerning appropriate methodology and allocation of resources that could significantly affect the final counts.<sup>12</sup>

2. The House identifies nothing in the legislative history of Section 195—either at the time of its original enactment in 1957, or at the time of its amendment in 1976—suggesting congressional concern that the use of sampling in the apportionment process would facilitate political manipulation.

<sup>11</sup> There is no merit to the House's criticism of the Bureau (see House Br. 3) for its plan to conduct a "one number" census rather than to produce alternative sets of population figures derived with and without the use of sampling. See *Counting People in the Information Age*, at 21 (D. Steffey and N. Bradburn eds., 1994) (National Academy of Sciences (NAS) Panel to Evaluate Alternative Census Methods explains that "[t]he one-number approach \* \* \* represents a departure from the methodology of the 1990 census," in which the ultimate decision against statistical adjustment "proved to be controversial because it occurred in a highly politicized environment in which interested parties perceived themselves as winners or losers, depending on which set of numbers was chosen."). That panel has accordingly "expressed strong approval of the one-number census concept." *Id.* at 22.

<sup>12</sup> Dr. Charles L. Schultze was the chairman of the Panel on Census Requirements in the Year 2000 and Beyond, a panel convened by the NAS pursuant to the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (13 U.S.C. 141 note). Dr. Schultze has testified that one advantage of the Bureau's approach is that "[t]he transparency of census operations to the Congress and the public will be improved." *Census 2000: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 1st Sess. 55 (1997). Dr. Schultze explained that "with sampling, the specific sample design is chosen before the census begins, reviewed by outside experts, and made publicly available. In the final push, the efforts of district managers and enumerators will be guided by the predetermined sample specifications and will, therefore, be much less subject to arbitrary decisions by census officials." *Id.* at 56.

Moreover, two features of the Census Act substantially undermine that notion.

a. The Act directs the Secretary to "take a decennial census of population \* \* \* in such form and content as he may determine, including the use of sampling procedures." 13 U.S.C. 141(a). The House contends that Section 141(a)'s authorization to use sampling is subject to limitations imposed by Section 195. Whatever the merits of that contention, however, Section 141(a) confers very broad—essentially plenary—discretion upon the Secretary with respect to the conduct of the decennial census. See *City of New York*, 517 U.S. at 19. That provision reflects Congress's confidence that the Census Bureau will discharge its duties in a professional and non-partisan manner. Congress would not likely have deemed the Bureau to be deserving of such confidence in all other respects, yet susceptible to political manipulation with respect to sampling alone.

b. Whatever the meaning of Section 195's opening proviso, the rest of Section 195 unambiguously directs the Secretary to utilize sampling for purposes other than the apportionment of Representatives among the States "if he considers it feasible." Those additional uses of census information include intrastate redistricting and the distribution of federal funds among States and localities—two highly politicized and contentious subjects. It strains credulity to suggest that Congress forbade the use of sampling in connection with apportionment out of concern that the census would be politically manipulated, while encouraging the Secretary to employ sampling in deriving the population figures that will be used for those other purposes.

#### F. The Census Bureau's Plan Is Consistent With The Constitutional Requirement Of An "Actual Enumeration"

1. The House of Representatives contends (Br. 45) that "[a]t the time of the Constitutional Convention, 'actual Enumeration' had a plain meaning" that excluded the statis-

tical methodologies described in the Census Bureau's plan for the 2000 census. That assertion is not accurate. As we explain in our opening brief (at 40), the word "enumeration" has long been understood to mean (*inter alia*) "[t]he action of ascertaining the number of something; *esp.* the taking a census of population; a census." 3 *The Oxford English Dictionary* (OED) 227 (1933). The manner in which the Bureau intends to conduct the 2000 census fits comfortably within that definition. Although the word "enumeration" *can* be used in the manner the House suggests, see *ibid.* (giving as second definition "[t]he action of specifying seriatim, as in a list or catalogue"), the House's reliance on the word's purported "plain meaning" is insupportable.<sup>13</sup>

<sup>13</sup> The Act of Congress providing for the first decennial census used the word "enumeration" in ways that plainly did not refer to "reckoning up singly" or any other method of conducting a census. As we explain in our opening brief (at 46 n.27), the opening sentence of that Act essentially equated "enumeration" with "caus[ing] the numbers of the inhabitants to be taken." Act of Mar. 1, 1790, ch. 2, § 1, 1 Stat. 101. The Act also required each marshal to take an oath pledging that "I will well and truly cause to be made, a just and perfect enumeration and description of all persons resident within my district, and return the same to the President of the United States." *Ibid.* (emphasis added). The requirement that the marshal "return" to the President the "enumeration and description" of the people within his district in itself suggests that "enumeration" was used there to refer to the final product of the census—i.e., the population totals themselves—as distinct from the process by which those totals were derived. That understanding is confirmed by Section 3 of the Act, which provided for the Marshals to transmit to the President only "the aggregate amount of each description of persons within their respective districts." 1 Stat. 102 (emphasis added). Finally, Section 1 of the 1790 Act stated that "[t]he enumeration shall commence on the first Monday in August next, and shall close within nine calendar months thereafter," 1 Stat. 101—language suggesting that the word was used there to denote the conduct of the census, although not any particular methodology. Contrary to the House's assertion (Br. 34), the 1790 Act did *not* state that census takers were "to make an 'enumeration' of every person within their districts."

The requirement of an "actual Enumeration" should also be construed in a manner that renders it consistent with the text and purpose of the Census Clause as a whole. The directive that an "Enumeration" be conducted follows, and was intended to effectuate, the fundamental requirement that Representatives be apportioned among the States "according to their respective Numbers." The rule proposed by the House, however, would compel the use of a particular methodology even if Congress believes it to be incapable of producing acceptably accurate population figures. Such a limitation would frustrate congressional efforts to ensure compliance with the independent constitutional requirement that the apportionment of Representatives must be based on the "respective Numbers" of "the several States." Basic interpretive principles counsel against that ossified and self-defeating reading of the Census Clause. "[I]t is," after all, "*a constitution we are expounding.*" *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

2. As we explain in our opening brief (at 41-46), the drafting history of the Census Clause strongly indicates that the phrase "actual Enumeration" was not intended to constrain Congress's choice of an appropriate methodology for determining the number of persons within each of the States. The phrase "actual Enumeration" was first employed by the Committee of Style and Arrangement. That committee revised an earlier draft provision, prepared by the Committee of Detail and approved by the Convention, stating that the "number" of each State's inhabitants "shall \* \* \* be taken in such manner as [Congress] shall direct." 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 183, 565, 566, 571 (1966 ed.). Because the Committee of Style was not authorized to make substantive changes in the draft Constitution submitted for its review and revision, see

The Act nowhere used the word "enumeration" to describe a process of identifying and making a notation of "every person," one at a time.



*Nixon v. United States*, 506 U.S. 224, 231 (1993), the phrase “actual Enumeration” should not be construed to limit Congress’s choice of an appropriate census methodology.

Contrary to the House’s suggestion (see Br. 48 n.67), we do not contend that the final text of the Constitution should be ignored or subordinated to the earlier draft prepared by the Committee of Detail. We do believe, however, that the Census Clause should be read, if fairly possible, in a manner consistent with *both* the final text and the earlier draft. Compare *Nixon*, 506 U.S. at 231 (the Court “must presume that the Committee [of Style] did its job”). The Commerce Department’s interpretation of the constitutional text satisfies that standard; the House’s construction does not.

3. The House also contends that the Framers were familiar with “estimation techniques” (Br. 47) and deliberately chose language that would preclude the use of such mechanisms. Statistical sampling as a probability method did not exist at the time the Constitution was drafted, however, see, *e.g.*, J.A. 343, and the Framers therefore could not have rejected its use. The estimation techniques described in the materials cited in the House’s brief (at 47 n.65) did not involve efforts to ascertain the population through actual inquiry of the people. They instead involved attempts to utilize *pre-existing* data from various sources that had initially been compiled for other purposes.

Although the Constitution’s “actual Enumeration” requirement does not preclude reliance on pre-existing records, it is not surprising that early Congresses eschewed their use. Federal administration of the census was deemed essential in light of the Framers’ expectation that “[t]he States will be too much interested to take an impartial one for themselves.” 1 Farrand at 580 (Edmund Randolph). Because the types of administrative records (*e.g.*, polling lists and militia rolls) on which colonial authorities relied would have been prepared and maintained by state officials even after the adoption of the Constitution, their use as a

basis for apportionment would have been inconsistent with the constitutional scheme. The Bureau’s plan for the 2000 census is subject to no comparable criticism.

4. The House contends (Br. 48) that the Framers mandated a particular *method* of ascertaining the population “to reduce the scope of potential disputes and minimize the opportunity for political manipulation.” That suggestion is without basis.

The Framers repeatedly expressed concern that Members of Congress might seek to perpetuate themselves in power by declining to reapportion the House of Representatives in light of population shifts. See Comm. Dep’t Br. 46-47 n.28. The Framers explicitly addressed that danger by requiring that a new enumeration be conducted at least once within every ten-year period. U.S. Const. Art. I, § 2, Cl. 3. Neither the text nor the history of the Census Clause, however, reveals a comparable intention to circumscribe Congress’s selection of *methods* of taking the census in order to prevent the use of a method that might improperly deny newly-populous States their fair share of representation.<sup>14</sup> To the

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<sup>14</sup> We are aware of only one instance in which a delegate to the Constitutional Convention appears to have alluded to the possibility that Congress might seek to maintain itself in power by conducting the census in an improper manner. Gouverneur Morris opposed any constitutional requirement that a census be conducted at specified intervals on the ground that such a requirement would “fetter[] the Legislature too much.” 1 Farrand at 571. He stated that “[i]f the mode was to be fixed for taking a census, it might certainly be extremely inconvenient; *if unfixed the Legislature may use such a mode as will defeat the object; and perpetuate the inequality.*” *Ibid.* (emphasis added). Morris was thus using the possibility of legislative malfeasance in the conduct of the census not as a justification for limits on Congress’s authority over census methodology, but as an argument for leaving Congress free to decide the timing as well as the mode of the census. Morris’s preference in that regard was based in turn on his desire to accomplish precisely what the decennial census requirement ultimately forbade—*i.e.*, Morris sought to maintain the northeastern States in power and to prevent the western States from

contrary, the Constitution gives Congress sweeping authority to conduct the decennial census "in such Manner as they shall by Law direct." *Ibid.*; see *City of New York*, 517 U.S. at 19 ("The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,' and \* \* \* there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides.").

\* \* \* \* \*

For the reasons stated above and in our opening brief, the judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. In the alternative, the judgment of the district court should be reversed.

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gaining control of the Congress even if future migration gave the western States a majority of the country's population. See *id.* at 583 (Morris states that "[i]f the Western people get the power into their hands they will ruin the Atlantic interests.").

Edmund Randolph responded to Morris's argument by stating that "[i]f the danger suggested by Mr. Govr. Morris be real, of advantage being taken of the Legislature in pressing moments, it was an additional reason, for tying their hands in such a manner that they could not sacrifice their trust to momentary considerations." 1 Farrand at 580. In arguing that Congress's hands should be tied, however, Randolph did not suggest the adoption of constitutional constraints on Congress's freedom to conduct the census in the manner it saw fit. Rather, Randolph supported Hugh Williamson's proposal (a slight reformulation of Randolph's own earlier resolution) to require simply that "a census shall be taken" at specified intervals. *Id.* at 579. Randolph thus implicitly rejected Morris's suggestion (which was in any event offered for tactical purposes only) that a constitutional requirement addressed to the timing of future censuses would furnish illusory protection if unaccompanied by constraints on Congress's freedom to direct the manner of the census. The Convention also rejected that suggestion, since it repeatedly approved language that would require a census to be taken at specified intervals while leaving the manner of taking the census to the discretion of Congress.

Respectfully submitted.

SETH P. WAXMAN  
Solicitor General

NOVEMBER 1998



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Supreme Court, U. S.  
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**NOV 17 1998**

**No. 98-404**

CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1998**

**UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,  
Appellants,**

**v.**

**UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,  
Appellees.**

**On Appeal from the United States District Court  
for the District of Columbia**

**REPLY BRIEF FOR APPELLEES  
NATIONAL KOREAN AMERICAN SERVICE &  
EDUCATION CONSORTIUM, INC., *et al.*  
IN SUPPORT OF APPELLANTS**

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## RULE 29.6 LISTING

Organization of Chinese Americans, Inc. is the corporate parent of Organization of Chinese Americans, Los Angeles, California Chapter. Other appellee corporations associated in this action with National Korean Service & Education Consortium, Inc. have neither corporate parents nor subsidiaries required to be listed pursuant to Sup. Ct. R. 29.6.



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# In the Supreme Court of the United States

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IN SUPPORT OF APPELLANTS

# OPINION BELOW

The opinion of the district court, *J.S. 1a*, is reported at  
11 F. Supp. 2d 76 (D.D.C. 1998).<sup>1</sup>

<sup>1</sup> References to the jurisdictional statement are cited as "*J.S.*"; references to the lower court's opinion are cited as "*Op.*"; references to the joint appendix are cited as "*App.*"; references to the brief of the plaintiff House of Representatives are cited as "*Pl.Br.*"



## STATEMENT OF THE CASE

This case comes before the Court on the district court's summary judgment prohibiting the use of statistical sampling for purposes of apportionment. Intervenor-defendants below presented substantial evidence that the use of statistical sampling would result in a more accurate census than would the exclusive use of traditional methods of enumeration, and would reduce, if not eliminate, the chronic problem of the differential undercount of the nation's minority population.<sup>2</sup> Although the district court found the differential undercount of minorities to be "among the most troubling aspects of the census in the late 20th century,"<sup>3</sup> that court made no findings concerning intervenor-defendants' evidence, but examined only the text and legislative history of the Census Act to conclude that the Act prohibits the use of statistical sampling for purposes of apportionment.<sup>4</sup>

The plaintiff House of Representatives and *amici* in support of the plaintiff disregard the proof of the greater accuracy that will result if statistical sampling is used in the 2000 census.<sup>5</sup> The plaintiff seeks to persuade this Court to make a factual inference in its favor based on the bald assertion that statistical sampling methodologies will not be more accurate to the extent that they are subject to political manipulation. Such an inference is inappropriate because the plaintiff moved for summary judgment and, therefore,

<sup>2</sup> See Declaration of Leobardo F. Estrada at ¶ 44, *App.*419.

<sup>3</sup> *Op.*, *J.S.*3a n.2.

<sup>4</sup> *J.S.*45a-64a.

<sup>5</sup> Plaintiffs Glavin, *et al.*, in *Clinton, et al. v. Glavin, et al.*, 98-564, make this error in presenting their arguments as well. See Brief for Appellees, Matthew J. Glavin, *et al.* (November 3, 1998).

defendants' and intervenors' evidence must be viewed in the light most favorable to defendants and intervenors for purposes of the plaintiff's motion and this appeal. The plaintiff's position is untenable in light of the outside peer review structure the Census Bureau has devised to insulate the statistical processes of the Census from political interference and to assure the objectivity, scientific validity, and integrity of the 2000 census.<sup>6</sup> On this record it must be accepted that the use of statistical sampling in the decennial census will be more accurate than the exclusive use of traditional methodologies and will substantially alleviate the chronic problem of the differential undercount of the nation's racial and ethnic minority population.

In any event, the susceptibility of traditional methods of enumeration to political biases as compared to statistical sampling methods is not at issue in this case. Nor can the inherent wisdom of the Secretary's choice of census methodologies be questioned so long as he acts within the confines of the Census Act and the Constitution. The only issues before this Court are whether the Census Act or the Constitution prohibits the Secretary from using statistical sampling in determining the population for purposes of apportionment. The wisdom of the Secretary's choice in exercising his discretion is not an issue before the Court.<sup>7</sup>

<sup>6</sup> *Census 2000 Report*, *App.*128-132.

<sup>7</sup> Nonetheless, with respect to the plaintiff's concern regarding political manipulation, the constitutional principles of equal representation and equal protection provide the necessary safeguards to ensure the accuracy of the Secretary's chosen method. See Brief For Appellees National Korean American Service & Education Consortium, Inc., *et al.* In Support Of Appellants, *United States Department of Commerce, et al. v. United States House of Representatives, et al.*, 98-404 (October 6, 1998).

## SUMMARY OF THE ARGUMENT

The plaintiff's interpretation of the Census Act is based on a fundamental mistake — fatal to its entire argument — of ignoring the part of the statute that disproves its argument. The plaintiff disregards section 141(b) in order to argue that Congress intended section 141(a) to provide only general guidance on the issue of sampling in the context of congressional apportionment whereas section 195 provides specific guidance. The plaintiff is wrong.

The plain text of section 141 — particularly sections 141(a) and 141(b) — and section 195 together demonstrate Congress's intent to permit sampling for a number of purposes, including the purpose of apportionment of Representatives in Congress among the several states. In 1976, Congress amended the statute specifically to allow sampling and specifically made changes in all three of these sections to ensure a consistent reading of the statute. In section 141(a), Congress provides that sampling procedures are permissible ways in which to undertake a decennial census of population. In section 141(b), Congress specifically states that the tabulation of the decennial census as prescribed by section 141(a) is required for the "apportionment of Representatives in Congress among the several States." Consistent with sections 141(a) and 141(b), the introductory clause of section 195 accords the Secretary discretion to use sampling for apportionment purposes, and the main clause of section 195 requires the Secretary to use sampling for non-apportionment purposes if feasible. The words of the statutory provisions speak for themselves, stating clearly that the Census Act allows the use of sampling in the apportionment process.

## ARGUMENT

### SECTIONS 141 AND 195 OF THE CENSUS ACT PERMIT THE SECRETARY TO USE SAMPLING IN THE DECENNIAL CENSUS FOR THE PURPOSE OF APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES

#### The Plaintiff Did Not Consider The Plain Language Of Section 141 In Its Entirety

The plaintiff's entire argument rests on a flawed analysis of section 141 of the Census Act. The plaintiff selectively focuses on section 141(a) — disregarding another key subsection — in order to argue that section 141(a) is a general authorization provision and that "§ 141(a) is not targeted specifically to determining the population for apportionment purposes." *Pl.Br.28*. From this ill-conceived premise that section 141(a) is merely a general provision, the plaintiff proceeds to argue erroneously that section 195 is the more specific provision purportedly containing the specific prohibition on the use of sampling for the purpose of congressional apportionment.

The flaw that undermines the plaintiff's entire argument is the failure to address section 141(b). This subsection specifically confirms that the grant of discretion to the Secretary to use statistical sampling in all aspects of the census found in section 141(a) applies to the Secretary's determination of the population for the purpose of congressional apportionment. Tellingly, the plaintiff's brief does not contain a single reference to section 141(b).



The text of section 141(a) and section 141(b) is explicit. Section 141(a) states:

The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, *including the use of sampling procedures and special surveys*. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

13 U.S.C. § 141(a) (emphasis added). On its face, section 141(a) authorizes the Secretary to use sampling in the decennial census, which is the census used to determine the population for purposes of congressional apportionment. Even the district court stated that section 141(a) "standing alone appears to permit statistical sampling in congressional apportionment." *Op.*, J.S.61a. In fact, section 141(a) is the sole provision authorizing the Secretary to conduct the constitutionally required decennial census for congressional apportionment entrusted to Congress under Article I, Section 2, Clause 3.<sup>8</sup> Still, the plaintiff argues that section 141(a) is "not targeted specifically" to apportionment *Pl.Br.28*, and instead is a "broad general grant[] of authority." *Pl.Br.29*.

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<sup>8</sup> See *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (citing section 141(a) as the provision by which "Congress has delegated its broad authority over the census to the Secretary").

Section 141(b), which the plaintiff overlooks, directly links section 141(a) and congressional apportionment. Section 141(b) states:

The tabulation of total population by States *under subsection (a) of this section as required for the apportionment of Representatives in Congress* among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

13 U.S.C. § 141(b) (emphasis added). Therefore, sections 141(a) and 141(b) clearly demonstrate that the statute authorizes the Secretary to use statistical sampling in conducting the decennial census for apportionment purposes.

Indeed, section 141(b) was *specifically* amended by Congress in 1976 to be read in conjunction with section 141(a). Congress *added* the following critical language — "*under subsection (a) of this section*" — to section 141(b) in 1976. H.R. Rep. No. 94-944, at 11 (1976). The text makes clear that Congress intended the scope of section 141(a) to encompass section 141(b)'s explicit reference to "the apportionment of Representatives in Congress among the several States."

Instead of addressing section 141(b), the plaintiff turns to other portions of the statute to buttress its proposition that section 141(a) is a broad, general provision without any specific authority. However, the other provisions upon which the plaintiff relies actually reinforce section 141's specific grant of discretion to the Secretary to use sampling for the purpose of congressional apportionment.

First, the plaintiff relies heavily on section 141(d) to argue that the reference to sampling in section 141(a) does not carry independent force because section 141(d), which applies to the mid-decade census *not* used for apportionment, contains the same reference to sampling. *Pl.Br.*30-31. To justify its interpretation of section 141(d), the plaintiff correctly cites to its companion section 141(e). Section 141(d) states, "the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population *in such form and content as he may determine, including the use of sampling procedures and special surveys.*" *Pl.Br.*30 citing 13 U.S.C. § 141(d) (emphasis added by the plaintiff). The authorization to use sampling under section 141(d) is then qualified by section 141(e)(2), which expressly prohibits the use of any information obtained in any mid-decade census (as opposed to the decennial census) for purposes of apportionment. 13 U.S.C. § 141(e)(2).

However, the plaintiff's analysis of section 141(a) is based on a stunning oversight: section 141(b) — which goes hand in hand with section 141(a). In fact, as discussed above, section 141(b) contains an explicit reference to section 141(a) and congressional apportionment. Thus, while the same reference to sampling is made in both sections 141(d) and 141(a), section 141(e) expressly prohibits the use of mid-decade census data for purposes of apportionment, but in contrast, section 141(b) *expressly permits* the use of sampling in the decennial census for the purpose of congressional apportionment. In fact, section 141(d) only governs the mid-decade census, which is never to be used for apportionment, and thus has no bearing on the use of sampling for apportionment.

The plaintiff also points to the use of "census of population" in section 141(g) to suggest that the reference to

sampling in connection with a "census of population" in section 141(a) is no more than a general provision, not directed specifically to sampling in the context of apportionment. *Pl.Br.*28-29. According to the plaintiff, section 141(g) reinforces the vague, unfocused grant of authority of section 141(a) because the term "census of population," as used in both sections, means a census conducted to obtain, in plaintiff's words, "a myriad of demographic information," and says nothing about obtaining information specifically for apportionment. *Pl.Br.*28. Once again, however, the plaintiff overlooks the significance of section 141(b), a section that does specifically link the "census of population" referred to in section 141(a), for which sampling may be used, to the context of apportionment.

Nor is the plaintiff's reliance on section 193 tenable. The plaintiff argues that section 141 is a general provision that is "limited" by sections 193 and 195 and that section 195 provides "specific guidance" governing the use of "sampling and special surveys" outlined in section 141. *Pl.Br.*29. However, while section 193 may offer more "specific guidance" on the use of special surveys, the plaintiff does not argue — because it cannot — that section 193 contains a prohibition that runs counter to the so-called "general" authority granted in section 141.<sup>9</sup> Indeed, the "specific" guidance provided in section 193 recognizes the complete discretion accorded the Secretary in the use of preliminary and supplemental statistics. Similarly, consistent with section 193, section 195 should be read to respect section 141's

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<sup>9</sup> Section 193 states: "In advance of, in conjunction with, or after the taking of each census provided for by this chapter, the Secretary *may* make surveys and collect such preliminary and supplementary statistics related to the main topic of the census as are necessary to the initiation, taking, or completion thereof." 13 U.S.C. § 193 (emphasis added).



particular grant of discretion to the Secretary on the use of sampling.

Thus, section 141 — reading all of its subsections together — specifically grants the Secretary the discretion to use sampling in the decennial census for the purpose of congressional apportionment. Consistent with section 141, as discussed below, section 195 provides that the Secretary shall use sampling for non-apportionment purposes, but has discretion to use sampling in the case of apportionment.

#### **The 1976 Amendments To Sections 141 And 195 Clearly Manifest Congress's Intent To Permit The Use Of Sampling For Congressional Apportionment**

Further proof that section 195 should be read consistently with section 141 is found in the manner in which Congress amended sections 195 and 141 in 1976.

Section 195 currently states:

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195.

In 1976, Congress amended both sections 195 and 141 so that the provisions read consistently together. The cardinal principle of statutory interpretation is to give effect to all of the provisions of a statute as a consistent whole.

*See, e.g., Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-89 (1947) ("Our task is to give all of it [the entire statute] . . . the most harmonious, comprehensive meaning possible. . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.").

Specifically, Congress amended sections 141(a), 141(b), and 195 contemporaneously. Section 141(a) was amended to add the language "decennial census of population" and "in such form and content as he may determine, including the use of sampling procedures and special surveys." As discussed above, section 141(b) also was amended to include the phrase "under subsection (a) of this section" so that section 141(a) incorporated section 141(b)'s explicit reference to "the apportionment of Representatives in Congress among the several States." 13 U.S.C. § 141; *see* H.R. Rep. No. 94-944, at 11-13 (1976); *see* S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466-67 (1976).

At the same time, Congress also amended section 195 to read consistently with section 141. To argue the contrary, the plaintiff writes, "[i]n 1976, Congress amended the second clause of § 195, changing 'may where . . . appropriate' to 'shall if . . . feasible,' but left the proviso in the first clause substantively intact." *Pl.Br.* 37. The plaintiff's statement is misleading. The proviso in the first clause — "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States" — was not left intact, but in fact, was amended to use the same language as in section 141. Congress deliberately amended the phrase regarding "apportionment" in both section 195 and section 141(b) using identical language to describe the term "apportionment" so that the two sections worked harmoniously together in a

statutory scheme which encourages the use of sampling for purposes of apportionment.

Specifically, Congress, in 1976, made the following changes to section 195 and section 141(b). (In the quoted language below, previous law eliminated by the 1976 Amendments is enclosed in brackets; new matter is printed in italics.)

Section 195 was amended in this manner:

Except for the determination of population for [apportionment purposes] *purposes of apportionment of Representatives in Congress among the several States*, the Secretary [may, where he deems it appropriate] *shall, if he considers it feasible*, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195; Pub. L. No. 85-207, 71 Stat. 481 (1957); see H.R. Rep. No. 94-944, at 12-13 (1976); see S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5468 (1976).

Section 141(b) was amended as follows:

The tabulation of total population by States *under subsection (a) of this section* as required for the apportionment of Representatives in Congress among the several States shall be completed within [eight] 9 months [of] *after* the census

date and reported by the Secretary to the President of the United States.

13 U.S.C. § 141(b); Pub. L. No. 85-207, 71 Stat. 481 (1957); see H.R. Rep. No. 94-944, at 11 (1976); see S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466-67 (1976).

Thus, it is apparent that Congress amended sections 141(a), 141(b) and 195 — all at the same time in 1976 — so that the separate provisions could be read harmoniously and consistently together to allow the use of sampling for the purpose of "apportionment of Representatives in Congress among the several States."

#### **The Legislative History Reinforces The Plain Text's Grant Of Discretion To The Secretary To Use Sampling For Apportionment**

The legislative history of the 1976 Amendments to the Census Act confirms that Congress's clear intent was to strengthen the use of sampling for a number of purposes, including congressional apportionment. Although it is unnecessary to review a statute's legislative history when its text is plain (as here), the plaintiff zealously argues that Congress's intent was to prohibit sampling for purposes of apportionment because "there was never *any* discussion, debate, or mention of a proposal to repeal the long-standing prohibition on the use of sampling for purposes of apportionment and to delegate unlimited discretion to the Secretary to determine the population on the basis of estimates." *Pl.Br.* 40. That is simply not true.<sup>10</sup>

<sup>10</sup> The plaintiff also cites a statement in the Conference Report regarding the amendment to § 141(a) to argue that "§ 141(a), as revised, (continued...)"



Congress repeatedly stated its intent to strengthen the use of sampling in the decennial census for a number of purposes without any limitation. In fact, strikingly absent from the legislative record is any remark affirming that such a "long-standing prohibition on the use of sampling" was going to be maintained by the new statutory regime. To the contrary, in both the House and Senate Reports, Congress declared its intent that one of the primary purposes of the 1976 Amendments was to "direct the Secretary of Commerce to use sampling and special surveys in lieu of total enumeration in the collection of statistical data whenever feasible," S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5464 (1976), and to "strengthen[ ] the congressional intent that, whenever possible, sampling shall be used," H.R. Rep. No. 94-1719, *reprinted in* 1976 U.S.C.C.A.N. 5476, 5481 (1976).<sup>11</sup> Thus, in 1976, both houses of Congress indicated their intent to grant broader

<sup>10</sup> (...continued)

is 'essentially the same as the provisions of existing law, except that a reference is made (as in the case of the mid-decade census) to the use of sampling procedures and special surveys.'" *Pl.Br.*42 (citations omitted). However, the plaintiff mischaracterizes the Conference Report's statement and the state of "existing law." First, by that statement, Congress explained that the 1976 Amendments did effect a change in the existing law with regard to its policy on the use of sampling procedures and special surveys. Second, as the plaintiff acknowledges, prior to the enactment of the 1976 Amendments, the Census Bureau had already used statistical sampling in the 1970 decennial census which was used to determine the population for congressional apportionment. *Pl.Br.*42-43.

<sup>11</sup> In its brief, the plaintiff disingenuously points to the "five legislative purposes" of the 1976 Amendments and argued that "[g]ranting the Secretary discretion to use sampling for apportionment is not among them." *Pl.Br.*41 n.56. However, as discussed above, one of the five purposes was to "direct the Secretary of Commerce to use sampling . . . whenever feasible," or in other words, to grant the Secretary discretion to use sampling without any prohibition for apportionment purposes.

discretion to the Secretary to use sampling in the decennial census for a number of purposes without prohibiting the use of this method for apportionment purposes.

Indeed, in its brief, the plaintiff concedes that Congress's tradition has been to afford the Secretary increasing discretion over the census process and that "Congress has delegated the Secretary greater authority over the course of time." *Pl.Br.*37 n.50. The plaintiff tries to downplay this legislative policy by pointing to two provisions in the 1976 Amendments that "actually constrained the Secretary's authority in several respects," *id.*, but notably, the plaintiff does not — indeed, could not — point to relevant sections 141(a), 141(b) or 195. That is because Congress's intent behind the 1976 Amendments to sections 141 and 195 was to strengthen the use of sampling for a number of purposes, including congressional apportionment.

\* \* \*

Congress's intent to effectuate the policy shift to favor the use of sampling is clearly manifested in the 1976 Amendments to sections 141 and 195. Based on the plain language and rules of statutory interpretation, the two sections should be read together to permit the use of statistical sampling for a variety of purposes, including congressional apportionment. The plain text of section 141 alone manifests Congress's intent to authorize the Secretary to use "sampling procedures" in conducting the "decennial census of population," the census to be used for the "apportionment of Representatives in Congress among the several States." Section 195's plain language reasonably must be read also to allow the use of sampling in the decennial census for purposes of apportionment.

## CONCLUSION

The Court should reverse the district court and vacate the order enjoining the use of statistical sampling in the 2000 census for the purpose of apportioning Representatives among the several states.

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UNITED STATES DEPARTMENT  
OF COMMERCE, ET AL.,

*Appellants,*

v.

UNITED STATES HOUSE OF  
REPRESENTATIVES, ET AL.,

WILLIAM J. CLINTON, ET AL.,

*Appellants,*

v.

MATTHEW J. GLAVIN, ET AL.

On Direct Appeal From The United States District  
Courts For The District Of Columbia And The  
Eastern District Of Virginia

**REPLY BRIEF OF CALIFORNIA LEGISLATURE, ET AL.**

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## ARGUMENT

## I. Plaintiffs' Arguments Against Statistical Sampling Are Based on False Assumptions

The arguments against the use of statistical sampling to provide a more accurate census in the year 2000 are riddled with false assumptions and red herrings:

1. Plaintiffs rely heavily on characterizing the traditional census methods as an actual count of the population and characterizing the use of statistical sampling as an estimate of the population. Brief for the United States House of Representatives ("House Br.") at 11, 33, 45, 47; Brief of Appellees, Matthew J. Glavin, et al. ("Glavin Br.") at 1-2, 42-43, 49, 50. Traditional methods, however, themselves produce only an estimate of the population, and a grievously flawed estimate at that. Statistical sampling is at least as much a method of actual counting as the self-enumeration by mail that has been accepted practice since the 1970s, the centuries old practice of relying upon a neighbor's sense of how many people live next door or down the street, or the decades old practice of imputing the number of residents who cannot be located based upon the characteristics of a nearby residence.

2. Plaintiffs invoke "the way the census has been conducted for 200 years" (House Br. at 24; *see also* Glavin Br. at 36) and a supposed "rule against statistical sampling that has governed the census process throughout our nation's history." House Br. at 8-9; *see also id.* at 31-32, 34-35. There is, however, no "way the census has been conducted" over the past 200 years. To the contrary, census procedures have changed dramatically over the years to accommodate changing conditions and take



advantage of improved techniques and technologies. See U.S. Department of Commerce, Bureau of the Census, *Report to Congress – The Plan for Census 2000* (August 1997) (“*Census 2000 Report*”), Joint App. 46-47; National Research Council, *Modernizing the U.S. Census*, National Academy Press, Washington D.C. (1995) at 19-21, 228-38; Declaration of Margo J. Anderson, Joint App. 343-46, 351-52. Statistical sampling did not even exist until the 20th century. Anderson Declaration, Joint App. 343, 347; Declaration of Stephen Elliott Fienberg, Joint App. 377-78. Nothing in the Constitution addresses statistical sampling, and Congress did not address the issue of sampling until 1957. Statistical sampling as contemplated for the 2000 census is a new and refined method of counting the population even as compared to the procedures proposed for the 1990 census. See *Census 2000 Report*, Joint App. 93 (“The methodology has undergone substantial review and improvement by the Census Bureau, the National Academy of Sciences, and by experts in statistical methodology from across the country.”). This case is not about estimating population based upon records of white male inhabitants set out in militia returns or polling lists, such as was done in some regions before the founding of the Republic. House Br. at 47 n.65. It is not about the “conjectural” and prospective population figures used for the first apportionment. Glavin Br. at 47-48. Equating statistical sampling with such techniques is a distortion of history and mathematics. See Brief on the Merits of the California Legislature, et al., in Case No. 98-404 (“California Brief”) at 37-39.

3. Plaintiffs raise the specter of the Census Bureau adding “imagined people” and subtracting other presumably real “people” from the population count based upon statistical sampling. House Br. at 4; see also Glavin Br. at 49. People accounted for by statistical sampling are not imaginary simply because they did not receive a census form, did not return one, or were not physically located by a census field worker. To the contrary, it is the uncorrected traditional methods – methods that mistakenly count deceased people, double count people who fill out a census form at both their primary residence and their vacation home or who move during the critical census period, and count people who have never existed – that result in the inclusion of non-existent people. See Fienberg Declaration, Joint App. 357-58; see also *Wisconsin v. City of New York*, 517 U.S. 1, 6 (1996).

4. In a similar vein, the House implies that a physical count will be eschewed in favor of a sample census and that a sample of 750,000 households that does not reflect demographic variations in different areas will be projected over the entire nation and across state lines. House Br. at 4. This is not the case. The census planned for the year 2000 includes efforts at a full physical count that make the most of traditional methods. See *Census 2000 Report*, Joint App. at 58-67, 73-80.<sup>1</sup> It includes an effort to reach every household in the nation by mail and

<sup>1</sup> The procedures planned for Census 2000 are explained in the Fienberg Declaration, Joint App. 361-68. They are also set forth in further detail in the U.S. Department of Commerce, Bureau of the Census, report entitled, *Census 2000 Operational Plan* (April 1998), Joint App. 148-340.

to count all inhabitants by the mailout/mailback technique. *Id.* at 61. It also includes extensive door-to-door follow-up and outreach campaigns. *Id.* at 58-61, 69-71, 77-79. The statistical adjustments at issue here are designed to supplement the physical count in order to account for those who are not found through this effort and to correct for the double counting that is known to occur. *Census 2000 Report*, Joint App. 41-45, 87-98. The samples for the statistical adjustment will be taken "from all areas of the country, with all race and ethnic groups, from all sizes of towns and cities, and from rural areas," in order to assure an improved distributive count among the states. *Census 2000 Report*, Joint App. 93.<sup>2</sup> "Because this sample is very large, and drawn separately for each state, it will provide reliable population numbers for every state and Congressional district." *Id.*

This is by no means a sample census, and the Court need not reach the question of whether a census based on sampling in lieu of a physical count would be a reasonable exercise of the Secretary's discretion. Rather, the question here is whether statistical sampling may be used to supplement a physical count and correct errors that traditional methods are known to produce.<sup>3</sup> As Professor

<sup>2</sup> See also *id.* at 87 (samples for the Postal Vacancy check), 88 (samples for non-response follow-up).

<sup>3</sup> The limited nature of the statistical adjustment at issue here permits the Court, were it so inclined, to go no further than to hold that the Census Act and Constitution allow the use of statistical sampling as a supplement to more traditional measuring tools rather than in lieu of the traditional methods. See *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980),

Choldin has noted, the agency decision to do the type of statistical corrections at issue here is "a decision that would have been considered technical in a quieter time." Harvey Choldin, *Looking for the Last Percent: The Controversy Over Census Undercounts* (1994) at 5.

## II. Plaintiffs' Statutory Arguments Are Ill-Founded

Plaintiffs advance a rule of statutory interpretation that offers no deference whatever to agency construction of the statute that it is entrusted to administer. The House disposes of this Court's extensive precedent calling for such deference in a cursory footnote. House Br. at 26-27 n.36. The Glavin plaintiffs ignore the *Chevron* doctrine altogether.

As we argue in our Brief on the Merits, the deference commanded by this Court in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny, applies in full force here and calls for ratification of the Census Bureau and Department of Commerce interpretation of the statute to permit statistical correction of the census. California Brief at 12-30. The cases upon which the House relies are not to the contrary. See House Br. at 26-27 n.36. Thus, *National Wildlife Fed'n v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997), supports the proposition that any agency interpretation, even in the midst of litigation, that reflects fair and considered judgment concerning the meaning of the statute, is entitled to deference. 127 F.3d at 1129. *Miller v. Johnson*, 515 U.S. 900 (1995), simply

rev'd on other grounds, 652 F.2d 617 (6th Cir. 1981), cert. denied, *Young v. Baldrige*, 455 U.S. 989 (1982).



stands for the proposition that the Court "retains an independent obligation in adjudicating consequent equal protection challenges" in light of an agency interpretation. 515 U.S. at 922. Similarly, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988), holds that when the agency did not take into account constitutional considerations in interpreting an ambiguous statute, the Court will. 458 U.S. at 577. Neither of these factors pertains here or weighs against the deference to which the interpretation of the Commerce Department is due.<sup>4</sup>

The House further suggests that congressional alteration of a statutory prohibition requires more than an express statutory authorization and more than amendment of the language of the provision in question. House Br. at 10, 29-33, 40. Instead, the House argues, the words in the prohibitory clause must themselves be altered, and the congressional record must explicitly include statements of intent and guidelines for the exercise of the authority granted. *Id.* at 10, 33, 37-38. No legal precedent demands such additional indicia of congressional intent, particularly when, as here, the added language explicitly authorizing use of sampling in the decennial census was totally unnecessary if plaintiffs' interpretation prevails.<sup>5</sup>

<sup>4</sup> *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which the House also cites (House Br. at 27 n.36) involved the state's authority vis-à-vis the federal government to set age limits for state court judges; it has nothing to do with agency interpretation of a statute or the question of *Chevron* deference at issue here.

<sup>5</sup> Plaintiffs argue that if Congress intended to repeal a pre-existing prohibition on sampling, the legislative history of the 1976 amendments would have reflected a clear and manifest

This argument by the House, and the Glavin plaintiffs' statutory argument, which amounts to a rewrite of the statute and deletion of section 141(a) (*see* Glavin Br. at 28-29, 33, 39-40), are fully answered in our Brief on the Merits.<sup>6</sup> *See* California Brief at 21-22.

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intention to do so. House Br. at 38-39; Glavin Br. at 30. Significantly, none of the cases plaintiffs cite involved a situation where Congress simultaneously expressed its intent on the face of the statute, as Congress did here in section 141(a), and amended the very statutory provision in which the prohibition was contained in a manner that eliminated any inconsistency, as Congress did here in section 195. There is no requirement that, in addition to expressing its intent in the text of a statute, Congress must reiterate that intent in legislative history. Indeed, "congressional silence, no matter how 'clanging,' cannot override the words of the statute." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985). Thus, in *Chisom v. Roemer*, 501 U.S. 380, 396 (1991), which the House cites, this Court noted that if Congress had intended to change the law, "Congress would have made it explicit in the statute. . . ." That is precisely what Congress did here.

<sup>6</sup> The Glavin plaintiffs' further argument that section 195 "can only be understood as vesting the Secretary with discretion to sample" (Glavin Br. at 37) would render meaningless the 1976 change in section 195 from "the Secretary may, where he deems it appropriate . . ." to "the Secretary shall, if he considers it feasible . . .," and it would make section 141(a) surplusage. None of the cases that the Glavin plaintiffs cite in support of this contention involves a statutory scheme comparable to the one here. *See, e.g., Anderson v. Edwards*, 514 U.S. 143, 154 (1995); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-11 (1981). *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986), not only fails to support plaintiffs, it applied the *Chevron* doctrine to hold that the Court must defer to the agency's construction of the scope of its authority. 476 U.S. at 980-81. That is exactly what should happen here, as well.

Despite plaintiffs' repeated claim that amendment of the Census Act in 1976 to authorize the use of sampling for apportionment purposes would constitute a "momentous change" that surely would have been accompanied by heated debate (*See* House Br. at 37, 32-33, 43; Glavin Br. at 31), all indications are that this matter was neither momentous nor controversial.<sup>7</sup> Multiple Census Bureau reports from 1970 through 1976 expressly and without apology noted the importance of sampling to add 1.5 million people in the 1970 count and provide a more accurate census. At the same time that Congress was considering the 1976 amendments to the Census Act, the GAO submitted a report to the House Committee on Post Office and Civil Service, the same committee that reported on the 1976 amendments. Comptroller General

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<sup>7</sup> The fact that issues of statistical sampling have all our attention now does not mean they were momentous then. Thus, the House's assertion that the 1957 enactment of section 195 was accompanied by "protracted legislative debate" (House Br. at 37 n.50) is simply wrong. In the 1957 enactments, as in the 1976 amendments, section 195 received little comment and was not highlighted in the statement of legislative purposes. *See Amendment of Title 13, United States Code, Relating to Census: Hearing on H.R. 7911 Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service, 85th Cong., 1st Sess. 4, 7, 8-9 (1957).* The assertion that in 1976 Congress was "captivated" by the possible effects of sampling on reapportionment and districting (House Br. at 43) is a distortion of the record. The Census Act's prohibition against use of a mid-decade census for reapportionment (13 U.S.C. § 141(e)(2)) does not signal congressional disapproval of sampling; to the contrary, it reflects Congress' desire to "avoid[ ] the confusion to the public of constantly changing representative districts." H. Rep. No. 94-944, 94th Cong., 2nd. Sess. 18 (1976) (supplemental views on H.R. 11337).

of the United States, *Programs to Reduce the Decennial Census Undercount, Department of Commerce: Report to the House Committee on Post Office and Civil Service*, GAO Rep. No. GGD-76-72 (May 5, 1976). That 1976 GAO report again delineated the use of sampling in the 1970 census. *Id.* at 21-22. Neither the reporting agencies nor any member of Congress at the time expressed any criticism of the 1970 census sampling procedures.<sup>8</sup> Instead, Congress accepted the 1970 Census, used it for reapportionment, and enacted the 1976 amendments to the Census Act which, while devoted in large part to the mid-decade census, also added explicit language to section 141(a) authorizing the use of sampling in the decennial census and modified section 195 in a manner consistent with that change.<sup>9</sup>

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<sup>8</sup> Plaintiffs fail to acknowledge or respond to this sequence of events and the complete absence of contemporaneous disapproval. Compare California Brief at 16-19 with House Br. at 43 and Glavin Br. at 30-31. Instead they recite statements made in the 1980s in the midst of litigation over whether the 1980 census would be statistically adjusted (Glavin Br. at 31 n.32), and rely on selective excerpts from legal memoranda analyzing the statute and ultimately concluding that it does not bar statistical sampling to correct the census. House Br. at 31 n.42 and 37-38 n.51. Plaintiffs also noticeably fail to address the fact that a unanimous Congress apparently saw no legal bar to sampling in 1991, when it directed a study by the National Academy of Sciences on the "means by which the Government could achieve the most accurate population count possible," including "the appropriateness of using sampling methods." Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, §§ 2(a)(1) and 2(b)(1)(C), 105 Stat. 635 (1991).

<sup>9</sup> Plaintiffs cite cases for the proposition that "[s]eemingly broad general grants of authority are commonly subject to specific limitations found elsewhere in a statute" as a reason to



That the legislative history attached to the 1976 amendments did not focus on this aspect of the change in law is neither surprising nor determinative. Depending upon what was in the minds of the members of Congress, statements in the legislative history that the new language was added to section 141(a) "to encourage the use of sampling and surveys in the taking of the decennial census,"<sup>10</sup> can support either side in this litigation. Thus, here, as in other situations in which the courts have invoked *Chevron* deference, the legislative history is of little help in casting light on the meaning of the statutory

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disregard the plain language of section 141(a). House Br. at 29; see also Glavin Br. at 28 and n.28. In the cases on which plaintiffs rely, the broad grant of authority did not expressly address the specific agency activity in question, and the specific limitation propounded was not ambiguous. See *United States v. Giordano*, 416 U.S. 505, 512-14 (1974); *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), which the Glavin plaintiffs cite, involved three provisions of the Federal Communications Act: a grant of FCC authority to regulate "interstate and foreign . . . communication," an express denial of "jurisdiction with respect to . . . intrastate communication service," and an ambiguous provision that addressed depreciation. 476 U.S. at 360, 362 (47 U.S.C. §§ 151, 152(b), 220). In holding that the Act did not preempt states' regulation of depreciation rates, this Court found that the section expressly addressing depreciation was not "so unambiguous or straightforward as to override the command of § 152(b)." 476 U.S. at 377. Applying that rationale to the instant situation supports a holding that section 195 of the Census Act is not "so unambiguous or straightforward as to override" the express authorization of section 141(a).

<sup>10</sup> S. Rep. No. 94-1256, 94th Cong., 2nd Sess. (1976), reprinted in 1976 U.S.C.C.A.N. 5463, 5466.

language. See, e.g., *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 412 n.10 (1993).

Nor is the absence of statutory guidelines for the agency's determination whether to use sampling in any given census something that should give the Court pause. Cf. House Br. at 33; Glavin Br. at 34. The census is by its very nature an enormous, complex, and technical endeavor that demands frequent judgment calls and policy determinations by the Census Bureau and the Secretary of Commerce. See *Modernizing the U.S. Census*, *supra*, at 19; see generally *Census 2000 Report*, Joint App. 34-147, and *Census 2000 Operational Plan*, Joint App. 148-340; see also *Wisconsin v. City of New York*, 517 U.S. at 23 ("Our deference [to the Secretary's determination] arises not from the highly technical nature of his decision, but rather from the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary."). Congress has rarely interposed itself into the methods by which the census will be accomplished and has been content to rely upon the Census Bureau, the Secretary of Commerce, the array of experts including the National Academy of Sciences on whom the Census Bureau relies, and regular reports to the congressional oversight committee. The statutory latitude afforded the decision whether to use statistical sampling to improve the census is no different from the discretion that the agency has long been given over other and equally significant aspects of the census.

The theoretical possibility that the agency will exercise its discretion unreasonably or in a manner that is inconsistent with the Constitution is no reason to deny it the discretion in the first place. Thus, any suggestion that

the Census Act must be interpreted to deny the agency discretion because it might use sampling in a manner that undercuts accuracy and the constitutional goal of equal apportionment set out in Article I, section 2 of the Constitution is without merit. As we discuss in our Brief on the Merits at 30-40, the Constitution does not forbid the use of statistical sampling as a method of counting, and, hence, the Court does not face a situation in which any statutory authorization of sampling would be unconstitutional. *Cf. Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (mere fact that a colorable constitutional argument against the interpretation of a statute may be advanced does not command an alternative interpretation.) Indeed, to the extent that constitutional concerns bear on the issue of statutory interpretation, they support an interpretation that permits statistical correction when, as here, such correction is highly reliable and is necessary to achieve a census that will permit equal apportionment.

In *Wisconsin v. City of New York*, this Court carefully examined whether the agency's decision not to use sampling in the 1990 census was a reasonable one, and upheld it on the grounds that the factors present at that time justified the agency's decision. Specifically, the Court, and the Secretary of Commerce before it, was concerned that use of statistical sampling would sacrifice distributive accuracy for the sake of overall accuracy. *Wisconsin v. City of New York*, 517 U.S. at 18, 20, 22. That is no longer the case. Fienberg Declaration, Joint App. 371-73; *Census 2000 Report*, Joint App. 87-98. For the 2000 census, we know that traditional methods standing alone will result in an increasingly debased census count and that the statistical sampling techniques now available will

improve the accuracy of the census at every level. "At all geographic levels important to political representation and funds allocation, Census 2000 will provide more accurate results than physical enumeration alone." *Census 2000 Report*, Joint App. 44.<sup>11</sup> In these circumstances, a decision not to make the statistical adjustment is arguably both unreasonable and inconsistent with the Constitution. See *Wisconsin v. City of New York*, 517 U.S. at 15, quoting *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992) (Plaintiffs challenging census decision have the "burden of proving that a decision contrary to that made by the Secretary would 'make representation . . . more equal.'").

### III. Plaintiffs' Constitutional Arguments Misrepresent the History and Meaning of Article I, Section 2

The House incorporates into the constitutional phrase "actual enumeration" a requirement that the

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<sup>11</sup> The Glavin plaintiffs attempt to create the false impression that the use of sampling will result in a less accurate census. Glavin Br. at 1, 3, 7, 41-42. All that the 1997 GAO report on which plaintiffs rely suggests is that attempts at in the field follow-up with 100% of the households that do not respond to mail questionnaires plus adjustment by statistical sampling would likely be more accurate than in the field follow-up with 90% of the non-responding households plus non-response sampling and adjustment by statistical sampling. General Accounting Office Report, GAO/GGD-97-142, *Progress Made on Design, but Risks Remain* (July 1997) at 26. By contrast, the failure to use statistical sampling which plaintiffs advocate will surely result in a less accurate census no matter how much effort is devoted to in the field follow-up. *Census 2000 Report*, Joint App. 54 (quoting National Academy of Sciences' Panel on Requirements); see also *id.* at 42, 49-52, 99, 106-07.



government count "one by one" only by discounting extant dictionary definitions from the 18th century that support the defendants' and intervenors' contention that an enumeration is a count or an accounting; instead, the House emphasizes alternative, noncontrolling definitions that include the concept of counting "singly" or "each separately." *Compare* House Br. at 1, 45-46 with House Br. at 46 nn.63 and 64; *see also* California Brief at 32-33. The Glavin plaintiffs achieve the same result by simply omitting contemporaneous definitions that are inconsistent with their argument. *Compare* Glavin Br. at 44-45 with California Br. at 32-33. Established census procedures such as census by mail, self-enumeration, imputation, and hearsay information would all be inconsistent with the interpretation of the constitutional language that plaintiffs propose. As we discuss in our Brief on the Merits, the constitutional language is entirely consistent with the statistical corrections contemplated here, and the constitutional purpose of equal apportionment demands such correction. California Br. at 30-40.

The history of article I, section 2 is likewise consistent with discretionary use of statistical sampling to correct the census count. The House suggests that the Founding Fathers intended to prohibit the use of statistical sampling in order to avoid political manipulation of the census. House Br. at 11, 48. This theory reads into the Constitutional Convention of 1787 matters that were never there. The political manipulation that the framers feared was twofold. First was the concern that unless Congress was constitutionally required to reapportion it would refuse to do so and lock in the relative political power of the northern and eastern states. *See, e.g., The*

*Records of the Federal Convention of 1787*, vol. 1 (Max Farrand, ed., rev. ed. 1937) at 533-34, 540-41, 558-61, 578-80, 583-86. Second was the concern that if timing and a population formula were not constitutionally fixed, then future congresses would revisit and alter the compromise whereby slaves would be counted only as 3/5 of a person. *Id.* at 592-96. The fixed and objective constitutional standard that the framers adopted to resolve these concerns was that the census be based upon population, include the whole number of some persons and exclude or only partially count others, and occur every 10 years. U.S. Const., art. I, § 2, cl. 3. The framers expressly left the method of counting to the discretion of the Congress. *Id.*<sup>12</sup>

Plaintiffs' asserted fear of political manipulation ignores the incontrovertible fact that the method of statistical sampling contemplated for the 2000 census would be established *before* the count was taken and so would not create any substantial opportunity for political manipulation. *Census 2000 Report*, Joint App. 132. Moreover, whether or not the statistical adjustment procedures are set in advance, they present no more opportunity for manipulation, and in many respects less opportunity, than other more conventional aspects of the census. *See*

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<sup>12</sup> Put another way, article I, section 2 commands that Congress determine every 10 years how many individuals reside in the nation and in each of the several states. A physical enumeration is designed to answer this question but does so with considerable error. The combined physical enumeration and statistical adjustment at issue here answers the very same question and does so with greater accuracy.

Choldin, *supra*, at 162, 236; *Census 2000 Report*, Joint App. 42-44.<sup>13</sup>

Amici Washington Legal Foundation expresses concern that persons interested in maximizing the political power of their neighborhood or state will manipulate the mail back procedures and lie to field workers. Brief of Washington Legal Foundation, et al. at 27-28. That risk, which is inherent in the traditional census methods as well, would actually be mitigated by the ability to send a limited number of highly qualified, well trained field workers into the sample area. See *Census 2000 Report*, Joint App. 89. Indeed, the dearth of qualified field workers is one reason why a 2000 census based exclusively on traditional methods, without the benefit of statistical sampling, will result in unreliable and incomplete information. *Census 2000 Report*, Joint App. 99-100.

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<sup>13</sup> For example, the funds budgeted for the census are a critical determinant in how much follow-up to the mail campaign can be achieved and what sort of outreach efforts are possible, with significant consequences for how many and what type of people will be counted or excluded. Similarly, the Census Bureau's plans in each stage - from compiling address lists, to hiring field workers, to partnerships with local governmental and non-governmental organizations - all are subject to partisan manipulation. Leaving such matters, including the question of whether to do statistical correction, to the agency serves to protect against rather than encourage political manipulation.

## CONCLUSION

For their own reasons, plaintiffs are satisfied with and seek a 2000 census that will seriously undercount African Americans, Hispanics, Asian Americans and Pacific Islanders, renters and children. The Legislature of the State of California, which faces using the census figures for redistricting and having them used for the distribution of federal funds, is not satisfied with such a census. The California Legislature supports the Census Bureau's carefully developed plan to use statistical sampling to correct the census undercount. Neither the Constitution nor the Census Act erects a barrier to that effort.

The judgments below should, therefore, be reversed.

Dated: November 16, 1998

Respectfully submitted,

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(26) (16)  
Nos. 98-404 and 98-564

Supreme Court, U. S.

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IN THE  
**Supreme Court of the United States**  
October Term, 1998

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UNITED STATES DEPARTMENT  
OF COMMERCE, ET AL.,

*Appellants,*

v.

UNITED STATES HOUSE OF  
REPRESENTATIVES, ET AL.,

*Appellees.*

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**On Appeal From The United States District Court  
For The District Of Columbia**

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**REPLY BRIEF FOR APPELLEES RICHARD A.  
GEPHARDT, DANNY K. DAVIS, JUANITA  
MILLENDER-McDONALD, LUCILLE ROYBAL-  
ALLARD, LOUISE M. SLAUGHTER, and BENNIE G.  
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SUPPORTING APPELLANTS

This Court should allow the Census Bureau to proceed with its planned methodology for conducting the 2000 Census. Use of this methodology, which will substantially increase accuracy of the census and reduce the undercount of groups that have traditionally been excluded, is plainly acceptable under



the only harmonious interpretation of the Census Act, as well as under the Constitution.

Appellees devote the bulk of their arguments on the merits to the claim that the Census Act precludes the Census Bureau from using sampling in the 2000 Census. Although appellees also make a nominal effort to argue that the use of sampling is unconstitutional, appellees gloss over the many arguments in the opening briefs that clearly demonstrate the fallacy of this claim. Similarly, although appellees argue that the Census Bureau's planned methodology may actually decrease accuracy and increase political manipulability, they cannot actually rely on these arguments -- which are erroneous in any case -- given that they are making a facial challenge to the use of sampling, they never contested accuracy as a basis for their claim in the court below, and they are defending grants of *summary* judgment.<sup>1</sup> Intervenor will therefore focus this reply on the primary issue before this Court: whether the Census Bureau's planned methodology is permissible under the Census Act. Because the answer is yes, this Court should reverse.

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<sup>1</sup> Appellees Glavin *et al.* spend significant effort trying to demonstrate that one of the two types of sampling the Census Bureau plans to use, sampling for nonresponse follow-up, decreases accuracy. Glavin Br. 2-3, 41-42. But appellees are challenging both types of sampling the Bureau plans to use. Moreover, sampling for nonresponse follow-up does help ensure accuracy by shortening the time required for the initial count and thus improving the effectiveness of the next phase of the process. Bureau of the Census, U.S. Dep't of Commerce, *Report to Congress -- The Plan for Census 2000*, JA 89-90 (rev. Aug. 1997). And by allowing the Bureau to save significant money, it enables the Bureau to undertake the Dual System Estimation process and thereby enhance accuracy overall.

## I. THE PLAIN LANGUAGE OF THE CENSUS ACT PERMITS SAMPLING.

Appellees fail to refute intervenors' showing that the most harmonious reading of the Census Act allows the Census Bureau to proceed with its planned methodology for the 2000 Census. This failure is fatal. Because the language of the Act, properly interpreted, points to a single correct interpretation, appellees' analysis of legislative "intent," based on history, presumptions, and legislative silence, is irrelevant. Moreover, it is flawed on its own terms.

Read together, sections 141 and 195 of the Census Act plainly permit sampling for purposes of apportionment. Appellees do not deny that on its face section 141 of the Act authorizes sampling for all purposes in the decennial census including apportionment, which is, after all the central purpose of the decennial census; indeed, appellees Glavin *et al.* forthrightly acknowledge that "[s]tanding alone, this provision would authorize the Secretary to sample for all purposes encompassed by the 'decennial census of population,' including determining the population number to be used for congressional apportionment." Br. 26.

Appellees also acknowledge the obligation to read different statutory sections harmoniously. *See, e.g., id.* at 27. Yet appellees, while arguing that the best interpretation of section 195 standing alone is that it prohibits sampling for purposes of apportionment, do not contend that this is the only possible reading of the text. Nor do they seriously contest that intervenors' interpretation is the more harmonious one. Under that interpretation, the Census Bureau is required to use sampling, if feasible, outside of the context of apportionment

and is allowed to use sampling within the context of apportionment. As a result, sections 141 and 195 both have meaning and there is no need to read a gaping exception into section 141 with respect to sampling used for apportionment purposes.<sup>2</sup> Appellees' interpretation, in contrast, creates such a gaping exception. Section 141's authorization of the use of sampling in the decennial census is read as not extending to

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<sup>2</sup> Appellees Glavin *et al.* argue that intervenors' interpretation fails to give meaning to the "except" clause in section 195. They assert that if the except clause did not exist, the Bureau would nonetheless have discretion to determine whether to use sampling for apportionment -- which intervenors assert is the purpose of the except clause. Glavin Br. 27-28; cf. House Br. 34 ("the feasibility standard established in § 195 would surely be broad enough to permit the Secretary to insist upon the use of the method that will produce the most accurate population figures practicable") (quotation omitted). This is nonsense. As appellees themselves acknowledge, "Section 195 limits the Secretary's discretion concerning the circumstances in which non-apportionment sampling may be used" by requiring use of such sampling, if feasible, Glavin Br. 29; in the absence of the except clause, this same limitation would apply to sampling for apportionment purposes.

Thus, absent the "except" clause, the Bureau would at least arguably be obliged to use sampling for apportionment, so long as a reasonable case could be made that sampling was accurate, even if the Bureau was not yet confident that sampling was the best method. The term "feasible" would provide the Bureau some discretion to refrain from using sampling, but not nearly as much as existed once Congress exempted apportionment from the requirement altogether. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971) ("the requirement that there be no 'feasible' alternative route admits of little administrative discretion"); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981) (holding that a requirement conditioned on feasibility was conditioned on whether it was capable of being done). In creating the exception, Congress intended to make absolutely clear that the Census Bureau had discretion not to sample even if it thought that sampling was "capable of" producing data that could be used for apportionment.

apportionment, the core purpose of the decennial census.<sup>3</sup> Under appellees' interpretation, therefore, section 195 is not simply redundant with section 141 rendering it "of no substantive import," as the House acknowledges to be true, House Br. 30, it takes *back* some of the authority to sample that section 141 explicitly provides. As a result, unless it is not "reasonably possible" to read section 195 as intervenors suggest, intervenors' harmonious interpretation, not appellees' discordant one, is correct. *Louisiana Pub. Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986); Gephardt Br. 17-18 (citing cases).

Appellees insist that intervenors' harmonious interpretation must be rejected because section 195 unambiguously prohibits sampling for apportionment purposes. But appellees do not argue that the *language* of section 195 unambiguously prohibits sampling. Appellees instead rely on historical inferences, free-standing presumptions, and legislative silence to argue that the meaning of the Census Act is not plain, *see* House Br. § II.A., and they then argue that because the meaning is not plain, this Court must rely on the same inferences, presumptions and legislative silence to interpret the Act, *see* House Br. 38. Such an effort to "bootstrap" a non-textual statutory interpretation should not be countenanced.

As intervenors showed in their opening brief, ordinarily the except/shall structure contained in section 195 does not

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<sup>3</sup> Appellees point out that under each parties' interpretation, section 195 limits the discretion granted by section 141, by requiring the use of sampling, if feasible, outside the context of apportionment. House Br. 29, Glavin Br. 29. But the fact that the two sections are not entirely harmonious outside the context of apportionment does not justify interpreting them as flatly inconsistent within the context of apportionment.



constitute a prohibition, especially in a statutory context. Gephardt Br. 20-22.<sup>4</sup> Appellees offer little to refute this. Instead, they respond that the language of section 195 does not clearly enough *allow* sampling to be read in its ordinary way given that “it is exceedingly unlikely” that Congress would have given the Census Bureau authority to sample in light of the statutory and historical context, and there is no “plausible alternative explanation of why Congress would have excepted apportionment from § 195’s mandate” other than that it intended to prohibit sampling for apportionment. House Br. 32-34; *see id.* at 38 (describing “[t]he absence of plain language to *support* [intervenors’] argument”) (emphasis added). Appellees are incorrect with respect to their assessment as to what Congress was likely to have done and their evaluation of the historical context, but more important, none of these assessments of “likeliness” and “plausibility” show that section 195 *unambiguously* prohibits sampling. As a result, this Court should read section 195 as allowing sampling for apportionment purposes, because only that interpretation makes section 195 harmonious with section 141. Indeed, such an interpretation of section 195 is the only reasonable one, because rather than relying on an assessment of what Congress was likely to have done with respect to sampling, it relies on what Congress did do in section 141. Any claims of “obliqueness” or “ambiguity” are eliminated when the two sections are read together.

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<sup>4</sup> Contrary to the claim of appellees Glavin *et al.*, Br. 37-38, the fact that the “shall” in section 195 is cabined by the phrase “if feasible” is not relevant for determining the meaning of the exception. For example, the sentence “except for federal holidays, law clerks shall, if feasible, report to work on Monday through Friday” leaves the clerks discretion to come to work on federal holidays despite the use of the phrase “if feasible” in the “mandatory” part of the sentence.

Moreover, appellees’ assessment of “plausibility” is simply incorrect. Appellees argue that in light of the constitutional significance of apportionment and the existence of standards governing the use of sampling outside the apportionment context, it is implausible that Congress would have delegated unfettered discretion to the Census Bureau to use sampling in the apportionment context. House Br. 32-33. But the discretion delegated by the Census Act is not unfettered -- it is fettered by the constitutional requirement of reasonable accuracy, *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996), and the statutory requirement that the census produce a tabulation of the “whole number of persons in each state.” 2 U.S.C. § 2a; *Franklin v. Massachusetts*, 505 U.S. 788, 819-20 (1992) (explaining that section 141 is not standardless, because section 2a “embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.”) (Stevens, J., concurring in the judgment, joined by Blackmun, J., Kennedy, J., Souter, J.). And, in any event, it is perfectly plausible that a Congress that believed that the Census Bureau should be required to use sampling, if feasible, outside the context of apportionment, including, for example, to gather population figures in the mid-decade census, would have determined that the Census Bureau should at least be allowed to use sampling in the apportionment context.<sup>5</sup> The special constitutional status of the census (and continuing doubts about the accuracy of existing sampling techniques for apportionment

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<sup>5</sup> The plausibility of such a delegation of authority is not in any way undercut by the fact that section 181 only allows the Census Bureau to use sampling to gather annual population data if it first determines that sampling will produce reliable data. House Br. 33. Congress chose to supply such standards with respect to the gathering of annual population figures, because the Constitution and section 2a did not already supply such standards, as they do with respect to apportionment.

purposes) simply explain why Congress did not *require*, if feasible, the use of sampling for apportionment.

Because it is perfectly plausible on its face that section 195 simultaneously requires that the Census Bureau use sampling, if feasible, outside the context of apportionment, and provides discretion to use sampling in the context of apportionment, section 195 -- even considered alone -- cannot be read to prohibit sampling for purposes of apportionment. The only examples appellees provide in which an exemption from a mandate reflects an unexpressed prohibitory intent are ones in which the nature of the mandate *on its face* makes it implausible that the speaker intended to establish anything but a prohibition in the excepted area. A woman who directs a servant to take all of her clothes to the cleaners except one particular item of clothing (e.g., a wedding dress) has clearly considered which of her clothes should be taken to the cleaner and which should not; there is simply no plausible reason why she would allow the servant to determine whether to take the remaining item to the cleaner. In contrast, because it is plausible on its face that Congress would want to leave the expert Census Bureau discretion to use sampling for apportionment, section 195 cannot be read as prohibiting the Bureau from doing so.

## II. APPELLEES' NON-TEXTUAL ARGUMENTS ARE EVASIVE AND ULTIMATELY UNPERSUASIVE.

Appellees ask this Court to depart from the best reading of the language of the Census Act based on assertions about congressional "intent" supposedly grounded in the history of the census and the Census Act. But this approach, in addition to being wrong in principle, see, e.g., *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475-78 (1992), is

unpersuasive on its own terms because appellees overstate the evidence supporting their interpretation, while making only passing reference in footnotes to facts that contradict their view.

### A. Neither Congress Nor the Census Bureau Had, Prior to 1976, Evincing a Long-Standing Aversion to Sampling.

First, appellees attempt to show that the 1976 Amendments, if interpreted to allow sampling, would have been an abrupt departure from two centuries of contrary practice. That is a vast overstatement. The legislation in the 19th and early 20th century prescribing methods for census taking did not constitute a conscious rejection of accuracy-enhancing sampling techniques, because those techniques were simply not known. *Gephardt Br.* 29-30.<sup>6</sup> This was still true in 1957 when Congress exempted apportionment from its

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<sup>6</sup> The forms of demographic *estimation* known to the Framers were nothing like the scientific statistical methodologies that the Census Bureau plans to employ in the year 2000. Colonial population estimation "rested substantially upon an elaborate fabric of educated guesses." James H. Cassedy, *Demography in Early America* 72 (1969). In particular, "Jefferson's method of obtaining his summary figures is confusing and apparently not accurate . . ." Evarts B. Greene & Virginia D. Harrington, *American Population Before the Federal Census of 1790*, at 142 n.10 (1932). And even if Jefferson's technique had been accurate, Jefferson had no way of knowing this to be so and no reason to expect that it would be accurate if applied more generally. Nonscientific estimation methods lack the certainty and reliability of modern statistical sampling methodologies, which permit rates of error to be measured and thus controlled. See *Report to Congress*, JA 116-17. It is little wonder, then, that until recently Congress required the census to be taken primarily by inquiry at each household, because until recently no reliable method existed that could more accurately ascertain the size and distribution of the American populace.



authorization to the Census Bureau to use sampling; Congress was concerned only with long-form type sampling aimed at efficiency rather than increased accuracy. *Id.* at 8-9, 33-35. It was not until the 1970s that broad-based sampling techniques designed to increase the accuracy of the census became prominent. By that time a smaller scale version of sampling -- imputation -- had already been used and implicitly accepted for over thirty years, two other forms of sampling had been used to increase the accuracy of the 1970 census and praised in a congressional report, and Congress had already adopted a significant number of innovations in the census designed to increase accuracy, or conferred discretion on the Census Bureau to do so. *Id.* at 5, 30-31 & n. 21.<sup>7</sup> Moreover, just before it amended the Census Act in 1976, Congress held hearings in which it discussed the use of statistical techniques, including sampling, to increase the accuracy of the census, without any Members expressing doubt as to the desirability of using such techniques when they were fully developed. *Id.* at 32. Thus, it is entirely plausible -- indeed logical -- to infer that Congress in 1976 decided to make clear by amending the Census Act that the Census Bureau had the discretion to use these new techniques.

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<sup>7</sup> While admitting that "Congress has delegated the Secretary greater authority over the course of time," the House contends that a few of the 1976 amendments actually limited the Secretary's discretion somewhat. House Br. 37 n. 50. But this hardly undermines the argument that the grant of discretion to the Secretary to use sampling for apportionment was consistent with a long-standing historical trend. Indeed, this trend was evidenced in the 1976 legislation itself in areas that include, but also go beyond, sampling. Thus, section 141(a) and (d), for example, give the Secretary broad-based authority to conduct the decennial and mid-decade censuses "in such form and content as he may determine." Moreover, the House does not deny the existence of a second historical trend towards adoption of innovations designed to enhance accuracy.

Appellees fail in their attempt to minimize the significance of this historical evidence. They argue that the use of statistical imputation since 1940 is somehow consistent with the existence of a continued congressional aversion to sampling, because imputation was only used as a last resort to fill in the gaps left by a headcount. House Br. 50 n. 69. But this does not alter the fact that from 1940 onward statistical imputation was viewed as a reasonable means of enhancing the accuracy of the census. Moreover, the statistical techniques planned for the 2000 Census are in many respects quite similar to statistical imputation in that they are used to adjust the results of an inaccurate headcount. *See* Glavin Br. 2-3 ("The Department will simply estimate the number and demographic composition of these unknown persons by *imputing* to them the population and demographic characteristics of the nearest nonresponding households.") (emphasis added and deleted).

Appellees similarly attempt to deflate the importance of the sampling techniques used in 1970 by contending that they made the Census Bureau "uneasy." House Br. 37, n. 51. But regardless of the uneasiness of the Bureau about the arguable illegality of these techniques at the time, these techniques were ones that a congressional report expressly endorsed and suggested expanding, making it plausible, indeed likely, that Congress decided to make clear the legality of these techniques and other similar ones in 1976. The House suggests that Congress may have forgotten that these techniques had been used in 1970 by the time it enacted the 1976 amendments. *Id.* at 43. But it is reasonable to presume that a Congress that had issued a report praising these techniques, and that had continuing responsibility for overseeing the Census Bureau, understood the fairly extensive use of sampling that had occurred in the census a mere six years earlier. Certainly, in assessing whether it is plausible that Congress in 1976

conferred discretion on the Census Bureau to use sampling for apportionment, the history of the 1970 census is more relevant than the 1790 or 1800 censuses on which appellees rely.

Appellees also argue, in a variant of their claim that the dog did not bark, that the history of congressional acceptance of innovations designed to increase the accuracy of the census and/or confer increased discretion on the Census Bureau is irrelevant, because prior innovations were only adopted after extensive congressional debate, whereas there was little debate on the use of sampling for apportionment in 1976. House Br. 37, n.50. But apart from the fact that this Court has correctly expressed caution as to the value of legislative silence as a means of inferring congressional intent, Gephardt Br. 27-28, appellees are simply incorrect that prior innovations always engendered substantial controversy. For example, appellees do not dispute that the Census Act, as currently worded, allows the Census Bureau to adjust the results of a headcount by using birth and death statistics and that 1976 congressional hearings evidenced some support in Congress for such an adjustment, *id.* at 23; yet Congress never at any point explicitly discussed whether to confer such authority on the Census Bureau. Similarly, when Congress in 1957 conferred authority on the Census Bureau to use sampling outside the apportionment context, it did so with only minimal discussion in the legislative history and no apparent controversy. S. Rep. No. 85-698, (1957), *reprinted in* 1957 U.S.C.C.A.N. 1706, 1708; H.R. Rep. No. 85-1043 (1957); *Amendment of Title 13 United States Code, Relating to Census: Hearings on H.R. 7911 Before the House Comm. on Post Office and Civil Service*, 85th Cong. (1957). And in 1964, when Congress conferred on the Census Bureau authority to conduct the census by mail, it also did so without controversy, although with somewhat more extended discussion. It did not, however, discuss the many

ways in which the Census Bureau could potentially have used its newfound discretion beyond adoption of a mail out census. Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737 (1964); S. Rep. No. 88-1474 (1964), *reprinted in* 1964 U.S.S.C.A.N. 3308; H.R. Rep. No. 88-373 (1964). Finally, in 1977, when Congress considered (and ultimately rejected) *requiring* development and use of statistical techniques to correct for the undercount, there was very little mention in hearings of this proposed requirement. H.R. 8871, 95th Cong. § 144 at 137 (1977) (introduced on August 7, 1977 by Cong. William Lehman and Patricia Schroeder), *reprinted in The Census Reform Act: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 95th Cong., at 137 (1977); H.R. 10386, 95th Cong. § 143 (1977) (introduced on December 15, 1977 by Cong. Lehman, Schroeder, Solarz, and Howard). Thus, it is quite plausible that Congress deliberately adopted without significant debate or controversy amendments that had as one of their intended effects *allowing* the Census Bureau to use sampling for apportionment.

Indeed, there is no other explanation for Congress's amendment of section 141(a) to add language authorizing sampling in the decennial census. As appellees admit, under their interpretation, the 1976 amendment to section 141(a) provided the Census Bureau no new authority to use sampling in conducting the decennial census despite the addition of this specific language. House Br. 30. Appellees argue that the purpose of the amendment was simply to clarify some ostensible ambiguity that existed in prior grants of authority to use sampling outside the context of apportionment. *Id.* at 30. But appellees do not explain what ostensible ambiguity was being clarified. Appellees also assert that because language added to section 141(d) did not have any substantive import,



and this language was identical to the language added to section 141(a), it can be inferred that Congress did not intend its amendment to section 141(a) to have any substantive import. But the language in section 141(d) was added *after* the language in section 141(a), in order to make it parallel to the latter section. See Gephardt Br. 19 n.10. Thus, the redundancy of the language in section 141(d) fails to overcome the presumption that Congress intended its amendment of section 141(a) "to have real and substantial effect." *Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 397 (1995).

**B. Appellees, While Relying on Supposed Indicia of Legislative Intent, Never Claim that Congress Affirmatively Intended to Bar the Use of Statistical Adjustments to Increase the Accuracy of the Census.**

The second flaw in appellees' intent argument is that, while relying on evidence of intent outside the statutory text, appellees can produce not the slightest indication of a conscious legislative intent, in 1957 or 1976, to bar the use of sampling to *adjust* the census to make it *more* accurate. Indeed, the historical evidence suggests that Congress long approved of such techniques in the form of imputation and the 1970 statistical adjustments.

Appellees address the issue of congressional intent to bar statistical adjustments only in a single footnote in the House brief. House Br. 36 n.49. In that footnote, the House *never even claims that Congress ever opposed statistical adjustments like those at issue here*. Instead, it offers two unpersuasive arguments for ignoring this flaw in its position. First, it claims that the sampling plans for 2000 go beyond "adjustment." *Id.* That is just wrong. The Census Bureau in 2000 plans to mail

census forms to *every* household in the nation, just as it has in the past. *Report to Congress*, JA 59-62, 77-78. The Bureau will also provide census forms in public places such as shopping malls, and will publicize a toll-free telephone number for those who wish to respond by phone. *Id.* at 77-78. This is a headcount, and the Bureau's planned use of sampling is designed to adjust this initial headcount. There is simply no basis for arguing that a headcount requires a certain *number* of attempts to contact each household; at some point, the census has always stopped trying to contact nonresponding households. At a minimum, the second half of the Bureau's proposed method -- the ICM follow-up survey -- is an "adjustment" method under any theory, and could be separately upheld on that basis.

Second, the House argues that intervenors' "special plea for sampling-based adjustment" is not grounded in the plain text of the Act, which either allows the Census Bureau to use sampling or does not. House Br. 36 n.49. But intervenors are not making a "special plea for sampling-based adjustment." Intervenors' argument is that on its face the present version of the Census Act categorically allows sampling when reasonably accurate. It is appellees who argue for a departure from the best reading of the text based on a psychoanalysis of congressional intent. Intervenors have simply explained that if this Court is to adopt that kind of approach, it would be odd to reach a result that all parties seem to agree Congress never intended, based on the fact that the plain language of the statute -- using the single term "sampling" -- does not support a distinction between types of sampling. The way to avoid this conundrum is to resist the invitation to reject the best reading of the statutory text, and to conclude that the Act authorizes the Secretary (subject to constitutional and other constraints) to

proceed with the carefully developed methodology that he, in his expert judgment, has determined is best.

**CONCLUSION**

The judgments below should be reversed.

Respectfully submitted,

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November 17, 1998



IN THE

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**Supreme Court of the United States**

OCTOBER TERM, 1998 SUPREME COURT, U.S.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,  
*Appellants,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,  
*Appellees.*

**On Appeal from the United States District Court  
for the District of Columbia**

WILLIAM J. CLINTON, *et al.*,  
*Appellants,*

v.

MATTHEW GLAVIN, *et al.*,  
*Appellees.*

**On Appeal from the United States District Court  
for the Eastern District of Virginia**

**REPLY BRIEF OF APPELLEES CITY OF LOS ANGELES,  
ET AL. IN SUPPORT OF APPELLANTS**

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**REPLY BRIEF OF APPELLEES CITY OF LOS ANGELES, ET AL. IN SUPPORT OF APPELLANTS**

**I. STATISTICAL SAMPLING WILL PRODUCE THE MOST ACCURATE AND COST-EFFECTIVE CENSUS EVER TAKEN.**

The House, Glavin-Appellees (collectively "Plaintiff-Appellees"), and several amici argue that statistical sampling will make the 2000 census less accurate than it would be otherwise. They are wrong. The only evidence introduced on the subject shows that using statistical sampling in the 2000 census will produce the most accurate and cost-effective census ever.

**A. Using Statistical Sampling Increases the Accuracy of Non-Response Follow-Up.**

The Glavin-Appellees announce — incorrectly — that "it is undisputed" that sampling for non-response follow-up ("NRFU") "decreases accuracy," Brief of Appellees, Matthew J. Glavin, *et al.* ("Glavin Br.") at 3 (emphasis omitted), and that "it is undisputed" that sampling during the NRFU "is less accurate than a traditional enumeration would be." *Id.* at 7. Not so.<sup>1</sup>

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<sup>1</sup> The Glavin-Appellees are fully aware that this factual issue is disputed, and their contrary claim misrepresents the record. After they made this same erroneous contention during argument to the district court, they were corrected. See City of Los Angeles, *et al.*, Intervenor's Supplemental Brief on Census Accuracy, Wedding Dresses, and "Actual Enumeration" at 2-5. In reality, the Glavin-Appellees had not contended this issue was



Statisticians and other census experts agree that using statistical sampling in the NRFU will increase the accuracy of the 2000 census. The National Academy of Sciences' Panel on Alternative Methodologies, the National Academy of Sciences' Panel on Requirements, the American Sociological Association, and the Government Accounting Office all support the use of sampling to improve accuracy. Joint Appendix in No. 98-404 ("House J.A.") at 53, 84 (*The United States Department of Commerce Bureau of Census, Report to Congress — The Plan for Census 2000* (revised and reissued August 1997) ("Census 2000")). As the National Academy of Sciences' Panel on Alternative Methodologies concluded:

[W]e do not believe that a Census of acceptable accuracy and cost is possible without the use of sampling procedures, both for the [NRFU] and the integrated coverage measurement....

*Id.* at 89-90.

Using statistical sampling in the NRFU increases its accuracy in at least three ways. First, the object of the census is to determine how many people live in each area as of a single day: April 1, also known as the "decennial census date." 13 U.S.C. § 141(a). Because people constantly move from one area to another, the farther away in

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"undisputed" when they moved for summary judgment, but instead had themselves failed to dispute this fact: "[s]tatistical sampling will produce the most accurate and cost-effective census ever." *City of Los Angeles, et al., Statement of Genuine Issues Concerning "Material Facts" Included in Plaintiffs' "Statement of Undisputed Material Facts"* at 19.

time from the census date the NRFU contact occurs, the more likely it is to be erroneous. Indeed, for this reason the NRFU was the "Achilles' heel of the 1990 Census." House J.A. at 362 (Declaration of Stephen Fienberg ("Fienberg Decl.") ¶ 12). "The further from the April 1 Census Day that data was collected, the more data quality declined and errors increased." *Id.* The NRFU planned for the 2000 census requires enumerators to visit fewer non-responding households. Thus, it will "reduce the time span over which the follow-up is conducted, reducing errors caused by a dynamic U.S. population." *Id.* at 363 (Fienberg Decl. ¶ 15).

Second, the more quickly the NRFU can be completed, the sooner the ICM can begin. "The longer the delay between Census Day and the ICM, the more respondents are likely to provide inconsistent responses (out of forgetfulness, or because of the continuous turnover in housing units — which affects approximately 150,000 housing units each month)." *Id.* at 89 (*Census 2000*).

Third, the Census Bureau will save about \$400 million by not having to contact 10% of the non-responding households. *Id.* at 107-108 (*Census 2000*). It will use these savings to hire more qualified enumerators and provide them with better training. *Id.* at 89. Armed with better enumerators, the Census Bureau will obtain more accurate data and achieve greater accuracy. *Id.* at 363 (Fienberg Decl. ¶ 15).

Thus, the Glavin-Appellees' complaint that statistical sampling in the NRFU is "being done only to save time and money," Glavin Br. at 42, overlooks the fact that saving time and money will increase census accuracy. *See also id.*

at 378-379 (Fienberg Decl. ¶ 44) (rebutting Glavin-Appellees' contention that their position is supported by the GAO).

**B. Post-Enumeration Adjustments Using Integrated Coverage Measurement ("ICM") Will Produce More Accurate Final Numbers.**

**1. ICM Is an Improved Method of Post-Enumeration Adjustment.**

The ICM will correct for the error in the initial count of the population made through the mail campaign, door-to-door follow-up, and the NRFU sampling. House J.A. at 92-98 (*Census 2000*), 364-65 (Fienberg Decl. ¶ 17). To estimate the undercount, the ICM will employ dual system estimation ("DSE"). *Id.* at 96-98 (*Census 2000*). DSE is a well accepted, commonly used procedure. *Id.* at 365 (Fienberg Decl. ¶ 18). The Court is familiar with it already. See *Wisconsin v. City of New York*, 517 U.S. 1, 8-10 (1996). DSE has been employed in the past two censuses to evaluate data quality and has undergone substantial review and improvement by the Census Bureau, with extensive input from panels at the National Academy of Sciences and experts in statistical methods. House J.A. at 365-368 (Fienberg Decl. ¶¶ 21-23).

During the ICM, the Census Bureau will randomly select a nationwide probability sample of 25,000 blocks (or approximately 750,000 housing units). *Id.* at 94. Using specially-trained enumerators, the Census Bureau will count the households and household members in the sample blocks. *Id.* at 95. Then, for each of the 25,000 sampled blocks, the Census Bureau will use DSE to compare the results of the first count of the population (through the mail campaign and

the NRFU) with the results of the second count of the population (the ICM) for each of the sampled blocks. *Id.* at 96-98 (*Census 2000*), 366-77 (Fienberg Decl. ¶ 21). Through this process, the Census Bureau will determine which households and household members were erroneously included or excluded in the first numbers. *Id.* In the end, the ICM will produce a set of improved, *i.e.*, more accurate, counts for the 25,000 blocks that will then be applied to every block in the nation. *Id.*

In addition, the Census Bureau's use of DSE in the ICM phase is sophisticated enough to account for differential undercount rates, *i.e.*, those rates that differ based on certain demographic and geographic qualities of different blocks. One would not expect the DSE estimate of the net undercount rate for a block in the heart of Washington, D.C., for example, to explain or reflect the net undercount in Langley, Virginia. Accordingly, in selecting the ICM sample, the Census Bureau starts with a list of all the blocks (or equivalent-size rural units) in the United States, then groups blocks into categories (or "strata") according to both geography and demographics, such as racial composition, proportion of homeowners to renters, and average household size. *Id.* at 94-96 (*Census 2000*), 372 (Fienberg Decl. ¶ 34). The undercount for each stratum is determined by measuring the undercount of a sample of blocks within the stratum by DSE. *Id.* The undercount rate of these blocks is then applied to the other blocks in that stratum. *Id.* The final step in the ICM—consists of correcting the raw census count for each stratum to take into account estimated omissions and erroneous additions to that stratum. *Id.*



## 2. The Plaintiff-Appellees' Attacks on the ICM Are Unfounded.

The House claims that because of the ICM, "hundreds of thousands of people will be deleted from the census totals, and millions of imagined people who were never identified will be added." Brief for the United States House of Representatives ("House Br.") at 4. The House has it backwards. The ICM was developed precisely because traditional methods of enumeration have resulted for decades in tens of millions of people being erroneously added and omitted. House J.A. at 375-77 (Fienberg Decl. ¶¶ 39, 41). The 1990 Census, for example, *erroneously added 11 million persons and erroneously omitted 15 million persons*. *Id.* The ICM will rectify these errors. Absence of the ICM will insure that millions of Americans — especially children, renters, minorities, and the poor — will go uncounted.

The Glavin-Appellees also question the ICM's accuracy. They note that the ICM is based upon the 1990 Post-Enumeration Survey ("PES"), and that the Secretary ultimately decided not to use the PES to adjust the 1990 census results. Glavin Br. at 4. They disparage the ICM because the initial 1990 PES estimated undercount projection had to be revised downward from 2.1% to 1.6%. *Id.*

This argument is very misleading. First, the 1990 PES successfully captured a large percentage of the undercounted populations. See House J.A. at 367 (Fienberg Decl. ¶ 22); see also B. Edmonston and C. Schultze, eds., *Modernizing the U.S. Census*, Panel on Census Requirements in the Year 2000 and Beyond, Committee on National Statistics, National Research Council (National Academy Press, 1995); D. Steffey and N. Bradburn, eds., *Counting People*

*in the Information Age*, Panel to Evaluate Alternative Census Methods, Committee on National Statistics, National Research Council (National Academy Press, 1994).

Second, the revision to the 1990 PES resulted, in large part, from a computer error that had nothing to do with the soundness of the method.<sup>2</sup> Computer errors, of course, are not reserved for statistical sampling, but can occur in other more traditional census processes.

Third, major improvements will make the ICM more accurate than the 1990 PES. Most important, the sample size of the ICM will be *five times* as large as it was in the 1990 PES.<sup>3</sup> This significantly larger sample size "is large enough, and sufficiently representative, to estimate population totals for each state," thus ensuring greater accuracy. *Id.* at 94 (*Census 2000*). Another important difference is that in the 1990 PES, the strata *crossed* state lines, while in the 2000 Census ICM, separate strata will be established *within* each state. In addition, the use of "strata" for each state, not used in 1990, is also expected to produce greater accuracy in the ICM. *Id.* at 373 (Fienberg Decl. ¶ 35).

<sup>2</sup> U.S. Dept. of Commerce, Bureau of Census, *Report of the Committee on Adjustment of Postcensal Estimates* 15 (Aug. 7, 1992) (attached as Exhibit E of Memorandum in Support of Motion of the City of Los Angeles, *et al.* to Intervene as Defendants (Apr. 3, 1998)).

<sup>3</sup> The 1990 PES gathered survey information from the inhabitants of approximately 5,000 blocks across the nation and the occupants of 150,000 households nationwide. The ICM, by contrast, will select 25,000 blocks and ultimately obtain information from the occupants of 750,000 housing units. House J.A. at 94 (*Census 2000*).

The Glavin-Appellees also wrongly assert that the ICM process is flawed because the Census Bureau has already “assumed” in determining the ICM post-strata blocks that some racial groups are “just as likely” to be counted as others. Glavin Br. at 49. This is wrong for several reasons. First, the strata that the Census Bureau will use have not yet been determined. See House J.A. at 92-98 (*Census 2000*). Second, the strata will group persons according to many characteristics, including, for example, age, location, proportion of homeowners to renters, and average household size — not just race. *Id.* at 94 (*Census 2000*), 372 (Fienberg Decl. ¶ 34). Finally, from a more technical standpoint, the Census Bureau is *not* assuming that certain persons have the same undercount rate as other persons, but rather that the undercount rates for different groups are closer to one another than either is to the national net undercount.<sup>4</sup>

**C. The ICM Must Be Used for Such Purposes as Redistricting and Allocation of Federal Funds, Even if It Cannot be Used for Apportionment**

Amici National Republican Legislators Association, *et al.* (“NRLA”) claim it would be improper to use statistically adjusted census data for *redistricting* purposes because

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<sup>4</sup> Apparently concerned that the post-strata might mix different ethnic or religious groups with each other, Glavin-Appellees worry that the Census Bureau is grouping “white Park Avenue socialites” with “Arabs and Hasidic Jews.” Glavin Br. at 49, n.49. As explained above, however, this grouping may be proper since, for example, these groups may share similar demographic and geographic traits. House J.A. at 379 (Fienberg Decl. ¶ 46).

of the error rates. See NRLA Brief at 24-27. Citing block-level error rates from the 1995 test conducted by the Census Bureau, it concludes — without analysis — that “[i]f the lowest level data are suspect, equal population local representation districts cannot be drawn from this data.” *Id.* at 26. Although these suits only challenge the use of sampling for *reapportionment*, not redistricting, NRLA’s wrongheaded argument warrants a brief response.

The block-level error rate does not have any bearing on the accuracy of the census figures used for drawing congressional districts. House J.A. at 126-27 (*Census 2000*). “Calculations of average error for small blocks can be misleading to those unfamiliar with these statistics.” *Id.* at 127; *see id.* at 123-126 (detailing why it is wrong to rely on block-level error rates). Thus, the error rate, if any, that is relevant to address the NRLA’s concern for accuracy should be the error rate at the congressional district-level. If sampling is used, the Census Bureau estimates that average error rate will be only 0.6 percent, compared to an average error rate of 1.9% without sampling. *Id.* at 122 (*Census 2000*), 375-376 (Fienberg Decl. ¶ 40).

Although NRLA does not appear to understand statistical analysis, and therefore draws incorrect conclusions, its focus on redistricting highlights the need to require statistical sampling methods such as the ICM for such non-apportionment purposes as redistricting and allocation of federal funds, even if the Court prohibits their use for reapportionment.

As discussed in the Los Angeles-Appellees’ opening brief at 46-49, because ICM and similar DSE methods would improve the accuracy of population data used for Congress-



sional redistricting — and eliminate the differential undercount of minorities and the poor — their use would advance compliance with the requirement of *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), that “as nearly as practicable one man’s vote in a congressional election is to be worth as much as another’s.” And because the Secretary has determined that statistical sampling methods are feasible, their use for non-apportionment purposes is required by 13 U.S.C. § 195.<sup>5</sup>

In short, if this Court prohibits statistical sampling for apportionment purposes, its use will still be required for other purposes. This will result in a “two number census,” one unadjusted and inaccurate for apportionment, the other

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<sup>5</sup> NRLA erroneously asserts that when Congress used “apportionment” in section 195, it intended to include intrastate redistricting in the term. NRLA Br. at 13-16. While it does not — because it cannot — cite any legislative history to support this departure from the statute’s plain meaning, the NRLA, instead, cites numerous examples purportedly where the terms “apportionment and redistricting [were used] synonymously.” *Id.* at 14-15. This Court, however, is not so confused about the difference between redistricting and apportionment. Indeed, it has “found this difference to be significant.” *Wisconsin*, 517 U.S. at 13; see *Dept. of Commerce v. Montana*, 503 U.S. 442, 460 (1992). Further, this Court has noted significant legal differences among redistricting, apportionment, and the conduct of the census. *Wisconsin*, 517 U.S. at 18 (“[I]t is difficult to see why or how *Wesberry* would apply to the Federal Government’s conduct of the census — a context even further removed from intrastate redistricting than is congressional apportionment.”).

adjusted and far more accurate for redistricting and other purposes.<sup>6</sup>

#### D. Statistical Sampling Is Not Prone to Manipulation for Political Purposes.

The experts agree that statistical sampling will reduce the opportunity for political manipulation of the census. House J.A. at 128-132 (*Census 2000*). Since sampling has known, objective properties, it is preferable to the uncontrolled human error that results from a reliance on only traditional methods of enumeration. *Id.* at 129.

In addition, the Census Bureau has safeguards built into its plan for the 2000 census. *Id.* at 128-132. For instance, the Bureau’s preparations for the 2000 census are being scrutinized by several blue-ribbon panels of statistical experts, including the 2000 Census Advisory Committee (consisting of 30 different professional governmental and non-governmental organizations), the Census Advisory Committee of Professional Associations,<sup>7</sup> and four different census advisory committees concerned with particular racial and ethnic populations. *Id.* at 56-57. Any attempt by one or more interest groups — inside or outside of the Bureau — to manipulate the census for political purposes is doomed to fail.

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<sup>6</sup> As noted in the Los Angeles-Appellees’ opening brief, a “two number census” would be unlikely to include statistical sampling in the NRFU, but would include the ICM. Los Angeles-Appellees’ Opening Brief at 48.

<sup>7</sup> This organization consists of the American Statistical Association, the Population Association of America, the American Economic Association, and the American Marketing Association.

Nonetheless, the Plaintiff-Appellees and some amici insist that the use of sampling will increase the risk of manipulation of the census. *See, e.g.*, House Br. 27, 48; Glavin Br. at 26 n.26, 49; Foundation Br. at 22-26. For instance, the Foundation claims “those charged with running” the 2000 census can manipulate the census figures because statistical sampling is based upon a set of “arbitrary assumptions.”<sup>8</sup> Foundation Br. at 23. The Foundation, however, must admit that it has “no information” suggesting that the Census Bureau’s staff will be coerced into manipulating any of its assumptions. *Id.* at 22.

Despite this admission, the Foundation won’t let go. Like children around a campfire, the Foundation spins several scary stories that purportedly illustrate how the 2000 census could be manipulated. Like most such stories, they are pure fiction. For example, the Foundation constructs a hypothetical apparently designed to show that the ICM could be manipulated by local governments that, purportedly, “stand to reap huge rewards” by drumming up participation during the ICM phase. *Id.* at 28. The Foundation is way off base. The adjustment factors resulting from the ICM are not applied to the particular political subdivision where the sampled ICM block is located. Rather, they are applied to the block’s entire stratum. House J.A. at 97-98 (*Census 2000*). Since each stratum spans an entire state and comprises hundreds or thousands of blocks, *id.* at 94, no single local

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<sup>8</sup> The Foundation ignores the fact that these assumptions are based on two decades of research and empirical data and will be “locked in” well in advance of the 2000 census. House J.A. at 132 (*Census 2000*).

government could conceivably reap *any* reward whatsoever by manipulating the ICM in this manner.

## II. SECTION 195 OF THE CENSUS ACT DOES NOT PROHIBIT SAMPLING FOR APPORTIONMENT.

The statutory arguments advanced by the House, Glavin-Appellees, and their amici mirror those made below, and were adequately refuted in the opening round of briefs. Two modest points, however, are worthy of additional response.

### A. The General/Specific Statutory Analysis of Sections 141(a) and 195 Advocated by the House and Glavin Renders Section 141(a) Meaningless.

The Glavin-Appellees concede — as they must — that “[s]tanding alone, [section 141(a)] would authorize the Secretary to sample for all purposes encompassed in the ‘decennial census of the population,’ including determining the population number to be used for congressional apportionment.” Glavin Br. at 26. So far, so good.

They — along with the House and their collective amici — then offer the construction of sections 141(a) and 195 shown in the table below:



Use of Sampling	§ 141 (a)	§ 195
Use of statistical sampling for apportionment	Secretary may use it in his discretion	Secretary may not use it
Use of statistical sampling for other purposes	Secretary may use it in his discretion	Secretary may use it in his discretion

Arguing that section 141(a) is "general" and section 195 is "specific," they conclude that section 195 controls. See Glavin Br. at 29; House Br. at 29.

But this construction, of course, renders section 141(a) mere surplusage. On the issue of the use of statistical sampling for apportionment, they say section 141(a) is trumped by section 195. And on the issue of the use of statistical sampling for all other purposes, they say the two statutes mean the same thing. Perhaps in recognition of this weakness, the House and Glavin-Appellees opine that section 141(a) really only contains "illustrative references to sampling of no substantive support [reflecting] Congress' modest intentions," and is nothing more than a little overlapping coverage that can be permissibly ignored. See House Br. at 30 & n.41; Glavin Br. at 40.

But the general/specific rule of construction is not intended to completely read the "general" section out of existence. Even the cases cited by the House and Glavin-Appellees make this abundantly clear. House Br. at 29 & n.40; Glavin Brief at 29 & n.30. For example, in *Morales v. Transworld Airlines, Inc.*, the Court found that a general

savings clause should not be applied where a specific section expressly dealing with preemption should be applied instead to preempt state consumer protection laws. 504 U.S. 374, 384-85 (1992). While the general savings clause was not applied, it still, however, had independent meaning that would be applicable in other circumstances not subject to preemption.<sup>9</sup>

"[T]he cardinal rule that, if possible, effect should be given to every clause and part of a statute" would itself be meaningless if the general/specific rule of construction could be applied to render general provisions nullities when other reasonable interpretations of the statute would save their meaning. See *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932).

<sup>9</sup> Likewise, in *HCSC-Laundry v. United States*, the Court found a "general" provision, 26 U.S.C. § 501(c)(3), which defines charitable institutions that are tax exempt, did not apply to a laundry run by a non-profit hospital services organization ("HSO") because there was a specific statute that listed the types of HSOs eligible for tax exempt status. 450 U.S. 1, 6 (1981). Nonetheless, section 501(c)(3) would — and clearly does — control in other circumstances. Similarly, in *United States v. Giordano*, a general statute regarding the U.S. Attorney General's broad delegation authority was trumped by a specific statute strictly limiting that delegation authority when authorizing wiretaps. 416 U.S. 505, 512-14 (1974). The fact that the Attorney General did not have the broad authority to delegate authorization for the wiretaps, however, did not render the general statute superfluous.

**B. Changes in the Secretary's Position on Section 195 Do Not Diminish the Deference Due to the Secretary's Interpretation of the Act.**

The Plaintiff-Appellees seem to place great weight on the fact that the Secretary's position on the legality and constitutionality of the use of sampling for apportionment purposes has evolved over the last few decades. *See* House Br. at 24-27; Glavin Br. at 40-41 & n.38. Citing correspondence and hearings transcripts — much of which was not in the record below — the House attributes the Secretary's embrace of a purportedly "radical theory" for interpreting section 195 to the instant litigation. House Br. at 26 & n.36. This, according to the House, relieves the Court from deferring under *Chevron* to the Secretary's interpretation of section 195. *Id.* at n.36.

The House is wrong. This Court has upon rare occasion found an agency's reasonable interpretation of an ambiguous federal law undeserving of deference. However, it has only done so when the suspect interpretation is a "post hoc rationalization" advanced by an agency to defend past agency action." *Auer v. Robbins*, 117 S. Ct. 905, 912 (1997). Here, the Appellants are not defending past use of sampling in the conduct of the census, so there is no past agency action to be justified after the fact. Merely because the "Secretary's interpretation comes to us in the form of a legal brief . . . does not, in the circumstances of this case, make it unworthy of deference." *Id.*; *see Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991); *see also National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) ("[D]eference to an interpretation offered in the course of litigation is still proper

as long as it reflects the agency's fair and considered judgment on the matter." ). Thus, under these circumstances, the Appellants' shift in position is wholly irrelevant.

**III. THE PLAINTIFF-APPELLEES' CONSTITUTIONAL ARGUMENTS ARE UNPERSUASIVE.**

**A. Enumeration Just Means "Census."**

Buried within a footnote is a significant concession by the House: "enumeration" is synonymous with "census." House Br. at 46, n.63. No one disputes that the Census Bureau intends to conduct a census in the year 2000. The constitutional issue, therefore, is a non-issue.

**B. The Constitution Requires a Periodic Census Rather than a Particular Method of Ascertaining the Population.**

Just as they did in the district court below, the Plaintiff-Appellees continue to make "historical" arguments that amount to little more than "junk history." Once again they erroneously contend that the "permanent & precise standard" that the Framers sought requires a certain method of conducting the census, when in fact, it had absolutely nothing to do with census-taking methods. *See* Glavin Br. 7, 50; House Br. 44, 48-49.<sup>10</sup>

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<sup>10</sup> The House has apparently recognized that they were on shaky historical ground below. Rather than quoting the "permanent & precise standard" language contained in the records of the Federal Convention, *see 1 Records of the Federal Convention of 1787* at 578 (Mason, July 11) (Max Farrand, ed. 1911), as they did in the district court, they have substituted their own wording, for example, "fixed, objective standard" (House Br. at 48) to stand for the same erroneous proposition.



As noted in the Los Angeles-Appellees' opening brief at 38-44, the "permanent & precise standard" urged by George Mason and ultimately adopted by the delegates was a periodic census of the inhabitants of the states. Congress was expressly given discretion to conduct the census "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3.

**C. The Framers Were Not Nor Could Not Be Opposed to Statistical Sampling.**

The House makes the nebulous claim that Jefferson was "familiar with estimation." House Br. at 11. In the district court, however, the House was a little bolder. It claimed that Jefferson "was familiar with *methods of statistical* estimation." Memorandum for Plaintiff United States House of Representatives in Support of Its Motion for Summary Judgment at 12 (Apr. 6, 1998). Its retreat is no accident.

As the House learned in the district court, Jefferson could not have used statistical estimation because it was not yet available. House J.A. at 377 (Fienberg Decl. ¶ 42). Statistical estimation was probably first attempted by Pierre Simon LaPlace in 1783, who used ratio estimation to calculate France's population. *Id.* It was many years before LaPlace's idea would develop into the theory of statistical estimation and 160 years before it would be used again in a census context. *Id.* Jefferson could not have used probability sampling methods because they were not developed for another 120-130 years. *Id.* When Jefferson "estimated" Virginia's population in 1782, he was making an educated guess based on his limited information. Thus, the reason why "no one suggested that Congress 'augment' the census

with statistical estimation," House Br. at 49, in the Framers' day is because this method did not yet exist.

#### IV. CONCLUSION

For all the reasons stated above, the judgments of the district courts should be reversed.

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

*Appellants,*

vs.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

*Appellees.*

*On Appeal from the United States District Court  
for the District of Columbia*

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**BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR  
JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF  
LAW, AMERICAN CIVIL LIBERTIES UNION, AND  
PUERTO RICAN LEGAL DEFENSE AND EDUCATION  
FUND IN SUPPORT OF APPELLANTS**

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## INTERESTS OF AMICI CURIAE

With the consent of the parties, the Brennan Center for Justice at New York University School of Law, the American Civil Liberties Union, and the Puerto Rican Legal Defense and Education Fund submit this brief *amici curiae* in support of defendants-appellants.<sup>1</sup> Letters of consent are on file with this Court.

The Brennan Center for Justice is a partnership between the friends, family, and law clerks of Justice William Brennan, Jr. and the faculty of New York University School of Law. The Center strives to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. At Justice Brennan's insistence, the Center pays no special deference to his views or opinions. In keeping with Justice Brennan's spirit, the Center has created a Democracy Program, which undertakes projects to promote equal representation and other core ideals of democratic government.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In particular, the ACLU has long been dedicated to defending the principle of one-person, one-vote, and to challenging government policies and practices that disadvantage traditionally underrepresented minorities.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national civil rights organization that exists to ensure that every Puerto Rican as well as other Latinos are guaranteed equal opportunities to succeed. Through litigation, advocacy, and education, PRLDEF has initiated hundreds of cases

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1. Pursuant to Supreme Court rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, contributed monetarily to the preparation or submission of this brief.

to combat discrimination in significant areas such as education, housing, employment, voting, and language rights.

*Amici* take interest in this case because they believe that a truly representative democracy cannot be sustained without an accurate count of the whole population, including racial and ethnic minorities at risk of marginalization. Undercounted groups face an unfair erosion of their members' ability to participate in the democratic process and a symbolic rejection of their status as full members of the polity. For these reasons, the Founders mandated a decennial census in Article 1, section 2, clause 3 of the Constitution. For the same reasons, the Thirteenth, Fourteenth, and Fifteenth Amendments (the "Reconstruction Amendments") altered the original Census Clause to require a full and inclusive count of the population, including racial and ethnic minorities.

In this case, all parties acknowledge that the decennial census regularly undercounts the population and that people of color are disproportionately undercounted. *Amici* believe that the ongoing practice of differentially undercounting racial minorities poses critical challenges to American democracy. Most directly, the differential undercount of minority populations may result in malapportionment of Congressional districts and consequent dilution of minority voting power on the national level. Because most states rely on census data for local districting purposes, the widespread disproportionate undercounting of people of color could have similar effects at all levels of state and local government.

Of at least equal importance, the ongoing differential undercount reduces the degree of confidence that members of minority communities have in American democracy by sending an unmistakable message that people of color are not full partners in the polity. In the 1996 Presidential elections, turnout among all voters was less than 50% of the eligible electorate; turnout among minority voters was much lower. These troubling statistics reflect a profound alienation of many citizens, especially citizens of color, from our democratic institutions. Choosing to continue a census

process that has — and will — differentially undercount citizens of color can only deepen and reinforce that disaffection.

*Amici* believe that the Secretary of Commerce's decision to use widely accepted statistical sampling techniques to avoid the differential undercount is a laudable attempt to achieve the constitutional goal of equal representation of racial and ethnic minorities and to reaffirm the equal status of members of those communities in American democracy. *Amici* submit this brief because a decision precluding the Secretary's efforts would undermine fundamental democratic values and unnecessarily exacerbate the alienation of minority populations from American political life.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a conflict between two diametrically opposed readings of both the Constitution and the Census Act. One would require a decennial census that continues an unfortunate history of excluding racial and ethnic minorities, especially African-Americans, from full participation in the nation's democratic life; the other would allow a decennial census that makes every effort to include members of racial and ethnic minorities as full participants in American democracy. The readings advanced by the Secretary of Commerce permit him to augment the traditional physical census count with commonly accepted and reliable statistical sampling techniques designed to avoid a differential undercount of the minority population. Conversely, the readings advanced by the House of Representatives preclude the Secretary from using such techniques, even if the resulting undercount will lead to underrepresentation of the minority population.

*Wisconsin v. City of New York*, 517 U.S. 1 (1996), announced the standard for challenges to the Secretary's conduct of the census. The Court explained that the Secretary's decision whether or not to adjust the census need bear only "a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." Thus,



so long as the Secretary's conduct of the census is "consistent with the constitutional language and the constitutional goal of equal representation," it is within the limits of the Constitution.

*Id.* at 19-20 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992)). Here, the Secretary has decided that statistical adjustment of the 2000 census will increase numerical accuracy and remedy the disproportionate undercount of racial and ethnic minorities without introducing distributive or other inaccuracies into the tally. Accordingly, the Secretary, guided by the expertise of the National Academy of the Sciences and the professional staff of the Bureau of the Census, proposes to use statistical adjustment techniques in conducting the 2000 census. The Secretary's effort to conduct an inclusionary census is clearly consistent with the relevant constitutional and statutory texts.

*Amici* demonstrate in Point I below that the Constitution not only *permits* the Secretary's plan, but in fact *affirmatively encourages* efforts to include racial minorities fully in the count, and may even *require* the discretion to use techniques for avoiding a discriminatory undercount when the Secretary determines that such techniques are necessary and appropriate. Even the original Census Clause, which counted slaves as only three fifths of a person, sought to achieve an accurate count of the population and, thus, would permit the Secretary's good faith efforts to avoid preventable undercounting. *See* Point I(A).

The Reconstruction Amendments freed the original Census Clause from its racist heritage and heightened the importance of accuracy by emphasizing the inclusion of traditionally excluded African-Americans in the decennial tally. As seen through the prism of the Reconstruction Amendments, the Census Clause does not merely permit the Secretary to correct undercounts that perpetuate the unequal representation of minority populations, but in fact strongly encourages the Secretary to do so. *See* Point I(B).

Indeed, as Point I(C) shows, section 2 of the Fourteenth Amendment depends upon the avoidance of a differential

undercount of minorities to maintain the structural integrity of its incentive system for African-American enfranchisement. Section 2 therefore operates as an independent constraint on Congressional power that preserves the ability to use corrective sampling techniques, where, as here, the Secretary has determined that they are necessary to avoid a discriminatory undercount of the minority population.

The constitutional principles developed in Point I should govern this Court's interpretation of the Census Act. *See* Point II. This Court should resolve any ambiguities in favor of an interpretation that advances the manifest purpose of the Census Clause, as amended by the Reconstruction Amendments, which is to produce an accurate and fully inclusive count of the population, especially racial and ethnic minorities. In addition, the Census Act should be construed to avoid the serious constitutional question that would be presented under Section 2 of the Fourteenth Amendment if the Act were read to forbid the Secretary from using widely accepted statistical techniques to correct preventable undercounts of minority populations.

## ARGUMENT

### I.

#### THE CENSUS CLAUSE, AS AMENDED BY THE RECONSTRUCTION AMENDMENTS, CANNOT PLAUSIBLY BE READ TO FORBID CENSUS OFFICIALS FROM USING TECHNIQUES REQUIRED TO PREVENT A DISPROPORTIONATE UNDERCOUNT OF MINORITIES.

The Secretary's plan to use statistical sampling techniques to remedy the disproportionate undercount of minorities is fully consistent with "the constitutional goal of equal representation," *Wisconsin*, 517 U.S. at 19, embodied in the Census Clause. As originally written, the Census Clause constitutionalized the principle of equal representation for white persons, permitting all efforts by the federal government to achieve an accurate population

count. However, the Census Clause's equal representation principle was perverted by the "three fifths compromise," which simultaneously validated the institution of slavery and diluted the vote of white Northerners relative to white Southerners. The Reconstruction Amendments overturned the "three fifths compromise" and ended its distorting effects by extending the principle to all persons, including African-Americans. Thus, the Census Clause, as amended by the Reconstruction Amendments, embraces a principle of inclusionary accuracy that permits, and may indeed require, the Secretary's current effort to reduce the differential undercount.

**A. The Census Clause, as Originally Written, Furthered the Principle of Equal Representation for White Citizens by Mandating an Accurate Assessment of the Population.**

**1. The Key Concern of the Census Clause Is Accuracy of the Count.**

The text and structure of the Census Clause leave no room for doubt that the Framers intended it to ensure that apportionment of the House of Representatives always would be based on an accurate assessment of the population.<sup>2</sup> Accuracy was essential to ensure "that no matter where he lived, each voter should have a voice equal to every other in electing members of Congress." *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964). To that end, the

2. One of the central questions the Framers faced was that of the composition of the national legislature. See *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964) ("The question of how the legislature should be constituted precipitated the most bitter controversy of the Convention."). The larger states preferred representation on the basis of population. The smaller states preferred that each state receive an equal vote in the national legislature. See *id.* at 10-14; Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 1.1(g), at 27-29 (2d ed. 1992). The result of this disagreement was the "Great Compromise," which created the House of Representatives, where each state would be represented in proportion to its population, and the Senate, where each state would receive two seats. See *Wesberry*, 376 U.S. at 12-14.

original Census Clause provided that an "actual Enumeration" of the United States be made after the first meeting of the United States Congress, and every subsequent ten years, "in such Manner as [the Congress] shall by Law direct." U.S. Const. Art. I, § 2, cl. 3. In addition, the Clause provided that "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers" as determined by the "actual Enumeration." *Id.*

The structure of the Clause manifests a concern for accuracy in three distinct ways. First, the Framers made Congress responsible for conducting the census, because the states did not trust each other to accurately report their population figures. Second, the Framers "included the periodic census requirement in order to ensure that entrenched interests in Congress did not stall or thwart needed reapportionment" and thereby undermine the principle of equal representation. *Franklin*, 505 U.S. at 791 (citing 1 Max Farrand, *The Records of the Federal Convention of 1787*, 571, 578-88 (rev. ed. 1966)).<sup>3</sup> Third, the Framers believed that tying taxation to population totals would discourage states from exaggerating their numbers.

The language of the Census Clause further indicates that the Framers were concerned with ensuring the accuracy of the census, rather than with mandating any particular methodology for conducting the count. The broad grant of discretion inherent in the command that the census be conducted "in such Manner" as

3. See also *Wesberry*, 376 U.S. at 13-14 ("The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' an idea endorsed by [George] Mason as assuring that 'numbers of inhabitants' should always be the measure of representation in the House of Representatives.") (quoting Farrand, *supra*, at 579, 580); *Young v. Klutznick*, 497 F. Supp. 1318, 1332 (E.D. Mich. 1980) ("The framers wanted, as much as possible, an accurate count because the count was to be used for the determination of Congressional apportionment."), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); Wilbourn E. Benton, *1787: Drafting the U.S. Constitution* 958-59 (1986) (statements of Edmund Randolph).



Congress directs is entirely inconsistent with an intention to mandate a specific procedure for determining the respective numbers of the states. *Cf. Wisconsin*, 517 U.S. at 19 ("The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'"). Indeed, Congress's discretion, and that of its delegate the Secretary, is bounded only by the requirement that the conduct of the census be consistent with "the constitutional language and the constitutional goal of equal representation." *Id.* at 19-20.

Moreover, the requirement that there be an "actual" enumeration was meant to ensure that the permanent method of apportioning representatives would be based on efforts to ascertain the true size of each state's population, rather than the guesswork to which the Framers initially resorted.<sup>4</sup> See *Young v. Klutznick*, 497 F. Supp. 1318, 1332 (E.D. Mich. 1980) ("When the Constitution speaks of actual enumeration, it speaks of that as opposed to estimates."), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981). The Framers thus surely intended to preclude

4. The Constitution provided for the temporary apportionment of representatives until the first "actual Enumeration" could take place. Article I, section 2, clause 3 provides that

until such [actual] enumeration shall be made, the State of New Hampshire shall be entitled to chuse three [Representatives], Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

This initial apportionment was based on conjectural judgments about each state's population. Subsequent apportionments were to be based on actual enumerations. See *Benton*, *supra*, at 978 (quoting James Madison: "The last apportionment of Congress, on which the number of Representatives was founded, was conjectural and meant only as a temporary rule till a Census should be established."); *id.* at 366-67 (quoting Nathaniel Gorham of Massachusetts to similar effect).

reliance on unscientific, inaccurate, and unreliable estimations of the population. But just as surely, they did not intend to bar use of scientific, accurate, and reliable statistical techniques that would be developed in the future (techniques with which the Framers would have been entirely unfamiliar).<sup>5</sup> See *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 678-79 (E.D. Pa. 1980) ("It may be that today an actual headcount cannot hope to be an accurate reflection of either the size or distribution of the Nation's population. If so, it is inconceivable that the Constitution would require the continued use of a headcount in counting the population."); *Young*, 497 F. Supp. at 1332 ("[N]othing in the Constitution . . . prohibits [statistical] adjustment techniques.").<sup>6</sup> In sum, the manifest purpose of the original Census Clause, as expressed in its structure and plain language, supports the

5. The Court has consistently interpreted the Constitution to take account of scientific and technological change. See, e.g., *Katz v. United States*, 389 U.S. 347, 353 (1967) (rejecting rule of *Olmstead v. United States*, 277 U.S. 438 (1928), and holding that wiretapping of telephone conversations by law enforcement officials, conducted without physical intrusion into telephone booth, was protected by Fourth Amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (First Amendment guarantees freedom of expression by means of motion pictures even though technology did not exist in 1791).

6. Of course, the census has never involved an actual headcount of the population as conceived by the appellees. Traditionally, the Census Bureau mails a questionnaire to each household and relies on information provided by the head of each household. In addition, the Bureau has relied on hearsay from neighbors, landlords, mail carriers, and others believed to have reliable information. Approximately seven million persons were enumerated as a result of such "last resort procedures" in the 1990 census. See Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 Rev. Litig. 1, 17 (1993). Thus, the federal government has never attempted physically to count the population person by person. See *Young*, 497 F. Supp. at 1329-30 ("It is . . . clear that the decennial census is not, and has not been, for at least the past decade, a simple, straightforward headcount.").

conclusion that the Constitution permits the Secretary to employ statistical sampling techniques to improve the accuracy of the 2000 census for purposes of apportioning seats in the House of Representatives.

**2. The "Three Fifths Compromise" in the Original Census Clause Denied Equal Representation to African-Americans and Distorted Equal Representation for Whites.**

Once it was decided that the states would be represented in the House on the basis of population, the Framers were faced with the question whether African-American slaves would be included in the census for purposes of apportionment. Although the slaves could not vote, the Southern states demanded representation in the House of Representatives and the Electoral College on the basis of their slave property. Unsurprisingly, Northern delegates opposed this proposal, which promised to increase dramatically the power of the South in the national government. As with the question of the composition of Congress, the Framers reached a compromise: three fifths of each slave would be included in the Southern states' numbers for purposes of representation. U.S. Const. art. I, § 2, cl. 3.<sup>7</sup>

The "three fifths compromise" perverted the very principle of equal representation for which it was ostensibly adopted. By its

**7. The "three fifths compromise" is framed as follows:**

Representatives and direct Taxes shall be apportioned among the several states . . . according to their respective numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons.

The compromise also created a significant tax break for slave owners, as southern states would be taxed only on the basis of three fifths of their slave property. See James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 Cardozo L. Rev. 2023, 2039-40 (1996).

terms, the compromise perpetuated the exclusion of African-Americans from the community of equal citizens. But the unholy bargain also polluted equal representation for white people, because white Southerners were rewarded for the practice of slavery with proportionately greater power in Congress than their Northern compatriots without having to enfranchise the slave population.<sup>8</sup> See Raymond T. Diamond, *No Call To Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 Vand. L. Rev. 93, 111-13 (1989); James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 Cardozo L. Rev. 2023, 2039-43 (1996). Thus, until passage of the Reconstruction Amendments, the Census Clause assured that an accurate count of the population, both slave and free, would primarily serve the interests of slave owners.

**B. As Altered by the Reconstruction Amendments, the Census Clause Not Only Permits But Affirmatively Encourages Techniques Deemed Necessary to Avoid a Discriminatory Undercount of African-Americans and Other Racial Minorities in the Decennial Census.**

The original Constitution in general, and the Census Clause in particular, excluded slaves from membership in the American polity. The Reconstruction Amendments profoundly altered the nature of American citizenship by including African-Americans in the political community. In doing so, the Amendments transformed the Census Clause from a relic of white supremacy into a herald of inclusionary democracy. The Clause, as amended,

8. Of course, women could not vote either, but they were nonetheless considered "citizens" in at least a limited sense. See *Minor v. Happersett*, 88 U.S. 162 (1874) (because the right to vote is not a "privilege [or] immunity" of citizenship, section 1 of the Fourteenth Amendment does not guarantee to female citizens the right to vote). The structure of the Clause reflects the deep paternalism of the Framers. The limited class of white male voters exercised the franchise on behalf of all citizens, including disenfranchised white women. And representation was not based solely on the number of citizens, but on the number of persons, including three fifths the number of slaves.



thus cannot be plausibly construed to ban census techniques that reduce the disproportionate undercount of historically excluded populations and more fully achieve the constitutional goal of equal representation. Indeed, as altered by the Reconstruction Amendments, the Census Clause strongly encourages the adoption of techniques deemed necessary to avoid a discriminatory undercount of the minority population.

### 1. The Original Census Clause Embodied an Exclusionary Conception of Citizenship.

The idea of citizenship involves the erection of boundaries, the drawing of lines between citizens and others. For most "old world" countries, defining the bounds of the political community was a relatively simple task. Citizens were inhabitants of nations with long-established geographical boundaries and largely shared ethnic, religious, and cultural heritages. See Eric Foner, *Who is an American?*, Culturefront, Winter 1995-1996, at 4, 9; Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 1.1(d), at 11 (2d ed. 1992).

For Americans, defining citizenship has been a more complicated matter. Unable to invoke the traditional indicia of community, we have defined ourselves by our common political creed, which emphasizes the universality of equality and freedom. See *The Declaration of Independence* (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, & the pursuit of Happiness."). Americans have thus been united by an ideal of democracy, where freedom is not the privilege of a particular class, but rather the birthright of every human being.

Yet, from the very beginning, the ideal of equal citizenship coexisted with the reality of American slavery. Indeed,

the most radical claims for freedom and political equality were played out in counterpoint to chattel slavery. . . . The equality of political rights, which is

the first mark of American citizenship, was proclaimed in the accepted presence of its absolute denial.

Judith Shklar, *American Citizenship: The Quest for Inclusion* 1 (1991).

Proponents of slavery defended exclusion of African-Americans from the community of citizens by insisting that African-Americans lacked the capacity for reason, self-control, independence, and self-governance. See Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 Yale L.J. 1563, 1574-76 (1996) (book review); see also A. Leon Higginbotham, Jr., *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* 28-52 (1996) (describing development of white supremacist ideology in colonial America). As long as African-Americans were regarded as beings incapable of rationality or civic responsibility, the reality of slavery could coexist, however uncomfortably, with the ideal of universal equality and freedom. Eric Foner, *The Meaning of Freedom in the Age of Emancipation*, 81 J. Am. Hist. 435, 441 (1994) ("The republican vision of a society of independent men actively pursuing the public good could easily be reconciled with slavery for those outside the circle of citizenship.").

Indeed, the existence of chattel slavery helped to define the idea of citizenship — a citizen was someone who was not a slave — giving citizenship "a powerful exclusionary dimension." *Id.* at 438. "Establishing the social, political, and legal structures to support slavery involved creating a clear group of white persons for whom the privileges of citizenship were reserved." Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, 'Foreignness,' and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261, 286 (1997). In this way, the racialized boundaries of the early American community were defined and maintained.

The Constitution adopted by the Framers codified this exclusion of African-Americans from citizenship. The "three fifths compromise" was but the most notorious facet of a Constitution

that embraced and perpetuated slavery.<sup>9</sup> Moreover, the Supreme Court gave its imprimatur to early constitutional racism in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). As Chief Justice Taney wrote:

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen?

60 U.S. (19 How.) at 403. The Court's answer was a resounding and painful "no." The decision sealed the fate of all African-Americans, whether slave or free, who were thereafter treated as members of "a subordinate and inferior class of beings" ineligible for inclusion in the national community. *Id.* at 404-05; see Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 44 (1989) (noting that *Dred Scott* "consigned [African-Americans] to a lower caste — a position entirely inconsistent with membership in the 'people of the United States'"). African-Americans remained the "untouchables" of the American community until enactment of the Reconstruction Amendments.

## 2. The Reconstruction Amendments Introduced an Inclusionary Ideal of American Democracy.

The Thirteenth, Fourteenth, and Fifteenth Amendments fundamentally altered the legal landscape of American democracy. Three years after the ratification of the Fifteenth Amendment, Justice Miller could write for the Supreme Court:

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9. Article I, section 9, clause 1 precluded Congress from interfering with the slave trade until 1808 (and did not guarantee that the trade would be halted at that time); Article IV, section 2, clause 3 provided that fugitive slaves who escaped to another state would be returned to their masters; and Article V barred amendment of the prior two provisions before 1808.

[T]he one pervading purpose found in [the Reconstruction Amendments], lying at the foundation of each . . . [is] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.<sup>10</sup>

*Slaughter-House Cases*, 83 U.S. 36, 71 (1873). Specifically, the Reconstruction Amendments transformed the meaning and operation of the Census Clause, with profound implications for the "constitutional goal of equal representation." *Wisconsin*, 517 U.S. at 20.

The Thirteenth Amendment banned slavery in the United States.<sup>11</sup> In so doing, the Amendment effectively repudiated the

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10. Racial segregation, the denial of the franchise, and other forms of unequal treatment did not, of course, perish with the abolition of slavery and the formal admission of African-Americans into the community of American citizens. Reconstruction has proven to be an ongoing process. Contemporary discrimination against and stigmatization of racial minorities continue their exclusion from full participation in the polity. See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303, 323 (1986) ("[D]iscrimination against the ethnic outsider is a form of exclusion — not physical exclusion from the country, but exclusion from belonging as a respected and responsible participant in the public life of the community.") (internal quotation omitted). More than a century after emancipation, the dissonance between the American creed of inclusion and the American reality of exclusion remains. See Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 23 (2d ed. 1962).

## 11. The Thirteenth Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.



three fifths compromise, by transforming the "other persons" of the original Census Clause (namely the slaves) into "free persons" entitled to be counted in full for purposes of congressional apportionment. So ended the 40% undercount of African-Americans constitutionalized under the unreconstructed Clause.

Both the proponents and the opponents of the Thirteenth Amendment recognized that the abolition of slavery would mean more than exemption from legal bondage. Freedom would mean entry of African-Americans into political and civil society as the legal equals of whites. See Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1, 8 (1995) ("From the opening gavel, both sides in the legislative debates based their arguments on a common understanding that the Thirteenth Amendment would protect an expansive definition of freedom."). The Thirteenth Amendment therefore not only granted the negative liberty of freedom from chattel slavery, but also granted Congress the power to enact legislation that would ensure positive liberty, freedom to exercise new rights and pursue new opportunities.

The Fourteenth Amendment then sought to ensure that the opportunities opened to African-Americans would be equal to those of white citizens.<sup>12</sup> Section 1 codified the principle of full African-American citizenship, providing:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

12. Although the Fifth Amendment does not include an Equal Protection Clause, this Court has long held that the Fourteenth Amendment's principle of equal protection applies to regulate federal action as well. See *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1955). In conducting the census, the Secretary of Commerce must therefore strive, as far as is practicable, to fulfill the constitutional goal of equal representation. See *Wisconsin*, 517 U.S. at 19-20.

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. The Amendment thus overruled the central holding of *Dred Scott* and formally included the freed slaves as equal members of the political community. See *Elk v. Wilkins*, 112 U.S. 94, 101 (1884) ("The main object of the opening sentence of the fourteenth amendment was to settle the question . . . as to the citizenship of free negroes, and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not . . . should be citizens of the United States . . .") (internal citation omitted); Bernard Schwartz, *The Amendment in Operation: A Historical Overview*, in *The Fourteenth Amendment: Centennial Volume* 29, 30 (Bernard Schwartz, ed., 1970).

Section 2 of the Fourteenth Amendment sealed the demise of the three fifths compromise by providing an explicit new rule for counting the former slaves: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . ." U.S. Const. amend. XIV, § 2. In addition, the second clause of section 2 addressed a structural anomaly that appeared with the abolition of slavery: African-Americans would be counted as whole persons for purposes of apportionment of representatives, but as yet had no guaranteed right to vote for those representatives.<sup>13</sup> To ensure that the end of slavery would not simply increase the power of white Southerners in Congress, without also encouraging full

13. See *Richardson v. Ramirez*, 418 U.S. 24, 73 (1974) (Marshall, J., dissenting); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 46 (1995); William Van Alstyne, *The Fourteenth Amendment, the 'Right' to Vote, and the Understanding of the Thirty-ninth Congress*, 1965 Sup. Ct. Rev. 33, 44 (1965); Arthur Earl Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 Cornell L.Q. 108, 109-11 (1960); Joseph B. James, *The Framing of the Fourteenth Amendment* 57-61, 66, 126, 137, 160-61 (1956).

African-American political equality, the Fourteenth Amendment provided:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

*Id.* Congress thus created an incentive for the enfranchisement of African-Americans by tying the prospect of enhanced Southern congressional power to African-American voting rights.<sup>14</sup>

14. See *Richardson*, 418 U.S. at 45-46 (quoting Representative Eliot: "[N]o State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial . . . it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens . . ."); *Reynolds v. Sims*, 377 U.S. 533, 597 (1964) (Harlan, J., dissenting) (quoting Representative Stevens: "The effect of this provision will be either to compel the States to grant universal suffrage or so shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive.").

Section 2 of the Fourteenth Amendment was not the thirty-ninth Congress's only strategy for encouraging voluntary extension of the franchise. For example, one of the necessary conditions under which representatives from the former Confederate states could be readmitted to Congress was their state's adoption of universal manhood suffrage. See *Reconstruction Act of Mar. 2, 1867*, ch. 153, § 5, 14 Stat. 428 (1867). The

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Of course, the most straightforward way to prevent white Southerners from increasing their power at the expense of African-American political equality would have been to extend the franchise to African-Americans. But the thirty-ninth Congress believed that mandatory African-American male suffrage was politically untenable at the time. See *Richardson v. Ramirez*, 418 U.S. 24, 73 (1974) (Marshall, J., dissenting); John M. Mathews, *Legislative and Judicial History of the Fifteenth Amendment* 13, 17 (1971); Joseph B. James, *The Framing of the Fourteenth Amendment* 47, 67-75, 137-39, 185 (1956). African-American men would have to wait for the fortieth Congress to see passage of the Fifteenth Amendment, which directly prohibited disenfranchisement on the basis of race.<sup>15</sup> The Fifteenth Amendment thus finally resolved the suffrage question and removed any remaining doubts as to the enforcement authority of Congress in that area.<sup>16</sup>

(Cont'd)

various Acts of Congress readmitting the Southern states to the nation also included this "fundamental condition." *Richardson*, 418 U.S. at 48-52. Of course, the enfranchisement of women was not accomplished until the adoption of the Nineteenth Amendment in 1920.

15. The Fifteenth Amendment provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The Reconstruction Congresses did not consider extending the franchise to African-American women.

16. Unfortunately, the promise of the Fifteenth Amendment was not easily realized. The Southern states adopted ingenious methods to prevent African-Americans from voting, without formally withholding the franchise.

(Cont'd)



In sum, the Thirteenth, Fourteenth, and Fifteenth Amendments extended the constitutional goal of equal representation to the African-American population (and ultimately, of course, to other minorities). The Thirteenth and Fourteenth Amendments ended the quintessential disproportionate undercount — the three fifths compromise — and for the first time required a full count of African-Americans in the decennial census. The Fourteenth and Fifteenth Amendments sought to ensure that the newly reconstituted democracy would provide meaningful rights of equal citizenship, by providing first an incentive and then a mandate to extend the vote to African-Americans.

The Census Clause that emerges in the wake of the Reconstruction Amendments refuses to tolerate systematic undercounting of African-Americans and instead mandates a census designed to include, not exclude, racial minorities. The House's suggestion that the Census Clause precludes efforts to eliminate a sustained disproportionate undercount that dilutes the voting power of racial and ethnic minorities thus makes no sense of the language, history, or purpose of the Clause, as amended by the Reconstruction Amendments. To the contrary, the amended Census Clause affirmatively promotes efforts to include historically underrepresented groups, especially African-Americans, as full members of the political community.

(Cont'd)

See, e.g., *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating poll taxes); *Louisiana v. United States*, 380 U.S. 145 (1965) (upholding Congressional legislation banning literacy tests); *United States v. Raines*, 362 U.S. 17 (1960) (repudiating extreme applications of the vagueness and overbreadth doctrines that previously had been applied to defeat federal legislation protective of the right of racial minorities to vote); *Terry v. Adams*, 345 U.S. 461 (1953) (ending the all-white primary); *Lane v. Wilson*, 307 U.S. 268 (1939) (invalidating grandfather clauses). See generally C. Vann Woodward, *The Strange Career of Jim Crow* (3d rev. ed. 1974). Thus, the worst fears of the Reconstruction Republicans were realized, as the South increased its representation in Congress while effectively disenfranchising African-American for decades to come. See Mathews, *supra*, at 15; Bonfield, *supra*, 46 Cornell L.Q. at 113.

Accordingly, the modern Census Clause not only permits but strongly encourages the freedom to use statistical techniques deemed necessary by the Secretary and his professional advisors to avoid discriminatory undercounting.

**C. Section 2 of the Fourteenth Amendment Precludes Congress From Banning the Use of Widely Accepted Corrective Techniques Deemed Necessary by the Secretary to Avoid a Discriminatory Undercount of Racial Minorities.**

In *Wisconsin*, this Court considered a challenge to the Secretary's decision not to adjust the census pursuant to the original Census Clause and section 1 of the Fourteenth Amendment. See 517 U.S. at 18-19 & n.8. But the *Wisconsin* Court did not consider the potential impact of section 2 of the Fourteenth Amendment. Indeed, the only reference in *Wisconsin* to section 2 of the Fourteenth Amendment occurs in a citation quoting the first clause, see *id.* at 5, and the opinion never considers whether section 2 as a whole alters the meaning of the original Census Clause or imposes independent constraints of its own. In fact, section 2 of the Fourteenth Amendment — by requiring that the "whole number" of racial minorities be counted in each census (instead of only three fifths of each person), and by structurally linking the potentially increased power of Southern states to the enfranchisement of the newly freed African-American citizens — precludes Congress from outlawing corrective statistical techniques deemed necessary by census officials to avoid a differential undercount of racial and ethnic minorities.<sup>17</sup>

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17. In *Wisconsin*, the Secretary had declined to adopt corrective techniques, deeming them inappropriate. 517 U.S. at 20-24. In the instant case, however, the Secretary affirmatively wishes to use corrective techniques, deeming them necessary to avoid a discriminatory undercount. Thus, the precise holding of *Wisconsin* is not before this Court. The narrow constitutional issue considered here is whether Section 2 of the Fourteenth Amendment permits Congress to ban a corrective technique deemed necessary by the Secretary to avoid a discriminatory undercount.

Section 2 of the Fourteenth Amendment was intended to serve a single purpose — to offer an effective inducement to the states of the old Confederacy to enfranchise their newly freed minority populations.<sup>18</sup> It is true that, as a practical matter, section 2 of the Fourteenth Amendment has been overtaken by the categorical protection of voting rights afforded to members of racial minorities by the Fifteenth Amendment. But, as this Court demonstrated in *Richardson*, 418 U.S. at 41-56, a close reading of the text and purpose of section 2 of the Fourteenth Amendment remains important in resolving constitutional issues falling within its scope. *Accord Hunter v. Underwood*, 471 U.S. 222, 233 (1985). And it must be remembered that the enfranchisement of African-Americans was central to the purposes of the drafters of Section 2. *See Bonfield, supra*, 46 Cornell L.Q. at 109; James, *supra*, at 33 (“Of all the movements influencing the Fourteenth Amendment . . . that for Negro suffrage was the most outstanding.”) and at 186 (“Indeed, to those most influential in framing the Fourteenth Amendment, Negro voters seemed the prime objective. Other movements were important principally as they were related to, or might be useful in, attaining this end.”).

When section 2 was adopted in 1868, nothing compelled the Southern states to permit African-Americans to vote, even though the emancipation of the slaves would entitle the former Confederate states to elect additional representatives to Congress. Lacking a technique to compel enfranchisement, the thirty-ninth Congress conceived an ingenious enfranchisement device: a mandate that enumeration be based on the “whole number” of the minority

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18. Recall that section 2 of the Fourteenth Amendment was drafted at a time when serious doubt existed as to whether the Fifteenth Amendment would ever come into being and when it was unsettled whether either the Equal Protection Clause or the Privileges and Immunities Clause of section 1 would be effective guarantors of the right to vote. *See Pope v. Williams*, 193 U.S. 621 (1904) (privileges and immunities clause of Fourteenth Amendment does not protect the right to vote); *Minor v. Happersett*, 88 U.S. 162 (1874) (same). The Equal Protection Clause was ineffective as protection for voting rights until *Carrington v. Rash*, 380 U.S. 89 (1965).

population coupled with a structural link between the apportionment value of such accurately enumerated minorities and their right to vote. Simply put, lacking coercive leverage, Congress designed section 2 to hold out the carrot of substantially increased Congressional representation to the Southern states in return for enfranchising their minority populations and the stick of reduced representation if they failed to do so.

Avoidance of a differential undercount of the minority population is, therefore, absolutely critical to the structural integrity of section 2, because it was the very size of the minority population that was to serve as the sole inducement for its enfranchisement. If an accurate count of the “whole number” of African-Americans residing in a given Southern state in 1868 would have resulted in one or two additional members of Congress, a significant inducement would have existed under section 2 for state officials to enfranchise minorities and thereby enjoy increased Congressional representation. If, however, African-Americans were differentially undercounted, the additional representation in Congress attributable to them would diminish or evaporate, thereby weakening or destroying the only existing incentive to enfranchise them. The command in section 2 to count the whole number of the population thus mandated the inclusion, not exclusion, of the newly freed African-American population. Allowing Congress to forbid the Secretary from using widely accepted statistical techniques deemed necessary to avoid a discriminatory undercount of the minority population would fly in the face of that mandate.<sup>19</sup>

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19. Although Congress’s discretion in this area is admittedly broad, that discretion is bounded by the requirement that its conduct of the census be “consistent with the constitutional language and the constitutional goal of equal representation.” *Wisconsin*, 517 U.S. at 19-20. A congressional attempt to prevent the Secretary from remedying the differential undercount in the manner he proposes would be inconsistent with the constitutional goal of equal representation as manifested in section 2 of the Fourteenth Amendment. Interpreting the Census Act to require such a prohibition would therefore raise a serious constitutional question.



In this case, census officials are confident that use of statistical sampling techniques to supplement the traditional physical count will prevent an inevitable differential undercount of racial and ethnic minorities, without introducing other unacceptable inaccuracies. As applied to these facts, the Census Act cannot be read to preclude utilization of those techniques, without, at a minimum, raising a serious constitutional question under section 2 of the Fourteenth Amendment.

## II.

### THE CENSUS ACT MUST BE CONSTRUED CONSISTENTLY WITH CONGRESS'S CONSTITUTIONAL RESPONSIBILITIES AND THEREFORE SHOULD BE INTERPRETED TO PERMIT THE USE OF STATISTICAL SAMPLING FOR APPORTIONMENT PURPOSES.

The Census Act, in which Congress seeks to carry out the constitutional mandate of the Census Clause, is not a model of clarity. The parties agree that sections 141 and 195 of the Act require that sampling be used, where feasible, for all activities except legislative apportionment, but they dispute whether the statute permits the use of statistical sampling in legislative apportionment. The Secretary's reading would permit (but not require) sampling to correct for a disproportionate undercount of minorities that distorts the apportionment process; the House's reading would prohibit sampling for apportionment purposes and thus preclude such a correction.

*Amici* believe that the appropriate method of resolving this dispute is to interpret the statute in a manner that both makes sense of the 1976 Census Act amendments and best advances the purposes of the post-Reconstruction Census Clause. Such an approach promotes consistency between the mandate of the amended Census Clause and implementing legislation enacted by Congress, which is after all presumed to act in accordance with its constitutional responsibilities. *See Rust v. Sullivan*, 500 U.S. 173,

191 (1991) ("[W]e assume [Congress] legislates in the light of constitutional limitations."); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 466 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

The most natural reading of sections 141(a) and (b) and section 195 both reflects the history of the Census Act amendments and is fully consistent with Congress's obligation under the Census Clause, as amended by section 2 of the Fourteenth Amendment, to minimize the undercount of African-Americans. The statutory amendments were enacted after the 1970 census, during which the Bureau of the Census had experimented with certain sampling techniques and had made a statistical adjustment to the census count.<sup>20</sup> *See Young*, 497 F. Supp. at 1328-29. Through the use of these techniques the Bureau of the Census imputed the existence of approximately 4.9 million people, who were added to the census.<sup>21</sup> *Id.* There was an overall recognition that this use of statistical sampling had improved the 1970 census and, in

20. The sampling techniques employed in the 1970 census included the National Vacancy Check and a post-enumeration Post Office Check. These procedures were described by the Census Bureau in a 1974 publication, "Effect of Special Procedures to Improve Coverage in the 1970 Census." *See Young*, 497 F. Supp. at 1328.

21. This adjustment did not eliminate the census undercount. The Census Bureau has estimated that 10.2 million people were missed in the original household survey; the use of sampling and statistical adjustment techniques reduced the undercount to approximately 5.3 million people. *Id.* at 1329.

particular, had reduced the differential undercount of minorities.<sup>22</sup> Accordingly, the most plausible reading of the Census Act is that Congress amended the Census Act in 1976 to promote greater use of statistical sampling techniques, but left it to the discretion of the Secretary and his professional advisors whether to continue to use the techniques in connection with the reapportionment process.

Prior to 1976, section 141(a) of Title 13 — the provision that empowers the Secretary of Commerce to conduct the census — had been silent concerning the use of statistical sampling.<sup>23</sup> Despite that silence, the Secretary of Commerce had utilized sampling techniques during the 1970 census to generally excellent reviews. The 1976 Congress, responding to the 1970 experience, amended section 141(a) expressly to provide for the use of sampling procedures. As amended, section 141(a) provides, in relevant part:

The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, *including the use of sampling procedures and special surveys.*

13 U.S.C. § 141(a) (emphasis added).

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22. The House Committee on Post Office and Civil Service described itself as "most impressed with the effectiveness" of the post-enumeration Post Office Check. "Report on Accuracy of the 1970 Census Enumeration," H.R. Rep. No. 91-1777, at 22 (1970).

23. The old provision read:

The Secretary shall, in the year 1960 and every ten years thereafter, take a census of population, unemployment, and housing (including utilities and equipment) as of the first day of April, which shall be known as the census date.

Pub. L. No. 85-207, 71 Stat. 481, 483 (Aug. 28, 1957) (amended 1976).

In addition, the 1976 Congress enacted a new section 141(b) providing that "[t]he tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives" be completed within nine months of the census. The interrelationship between 141(a) and (b), and the explicit mention of the apportionment process, strongly indicate Congress's awareness that the decennial census for which sampling was permitted under section 141(a) would be used for purposes of apportioning representatives.

The 1976 Congress also amended section 195 of Title 13, which governed the use of statistical sampling for purposes other than apportionment. Whereas the former provision had merely permitted the use of sampling for such purposes,<sup>24</sup> the new section 195 now required the use of sampling, wherever feasible. As amended, section 195 provides:

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary *shall*, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195 (emphasis added).

Thus, the 1976 amendments affirmatively promoted the use of statistical sampling by the Census Bureau, both for purposes of apportionment and for other census purposes. The use of sampling for apportionment purposes is within the Secretary's discretion;

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24. The old provision read:

Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Pub. L. No. 85-207, 71 Stat. 481, 484 (Aug. 28, 1957) (amended 1976).



for all other purposes, the use of statistical sampling is mandatory, where feasible.<sup>25</sup> Prior to the decision below, every federal court to consider the 1976 amendments to the Census Act had concluded that the amended act permits the use of sampling and statistical adjustment for apportionment purposes. See *City of New York v. United States Dept. of Commerce*, 34 F.3d 1114, 1124-25 (2d Cir. 1994), *rev'd on other grounds sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *City of Philadelphia*, 503 F. Supp. at 679; *Young*, 497 F. Supp. at 1334-35.<sup>26</sup>

25. The court below interpreted the Census Act to prohibit sampling for apportionment purposes. The court reached this conclusion by analyzing section 195 in isolation and interpreting it to prohibit sampling for apportionment. The court then turned to section 141 and attempted to divine an interpretation of that provision that would not be inconsistent with its reading of section 195. See *United States House of Representatives v. United States Dept. of Commerce*, 11 F. Supp. 2d 76, 97-104 (D.D.C. 1998). This is an improper mode of statutory interpretation. Both section 141 and section 195 were amended as part of the same act in 1976. Pub. L. No. 94-521, 90 Stat. 2459, 2461, 2464 (Oct. 17, 1976). When Congress makes multiple statutory changes in a single enactment, each change is not to be viewed in isolation; rather, courts are to view the amendments as a unified whole. See *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) (noting a "cardinal rule" of statutory construction that "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (internal quotation marks and citation omitted); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (same). Taken together, the amendments to sections 141 and 195 can clearly be seen as an effort by Congress to promote greater use of statistical sampling techniques for both apportionment and other purposes.

26. Several of these courts have suggested that the "except" clause in section 195 would nevertheless preclude the Secretary of Commerce from conducting a census entirely on the basis of statistical sampling, without the base of raw data obtained through the household survey. See *Young*, 497 F. Supp. at 1335 ("All that § 195 does is prohibit the use of figures derived solely by statistical techniques. It does not prohibit the use of statistics in addition to the more traditional measuring tools to arrive at a

(Cont'd)

Ignoring the most plausible reading of the Census Act in favor of the Houses's reading, which forbids the use of sampling for apportionment even when necessary to reduce the disproportionate undercount of the minority population, would be wholly inconsistent with the strong encouragement of racial inclusiveness that pervades the post-Reconstruction Census Clause. Even if one were to assume that an exclusionary reading of the Census Act mandating a racially discriminatory census were as plausible as an inclusionary reading (and it is not), this Court should choose the reading that advances the inclusionary purpose of the post-Reconstruction Census Clause.

In fact, an exclusionary interpretation of the Census Act would raise substantial constitutional questions under section 2 of the Fourteenth Amendment. As discussed above in Point I(C), the efficacy of section 2 turns on an accurate count of the minority population. Accordingly, section 2 may well forbid Congress from preventing the Secretary from taking widely accepted steps to avoid a discriminatory undercount of the minority population

This Court regularly construes ambiguous statutory provisions so as to avoid substantial constitutional questions. See, e.g., *Public Citizen*, 491 U.S. at 465-66; *Edward J. DeBartolo Corp.*, 485 U.S. at 575; *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909). In this case, our reading is not only the most plausible, but it advances the purpose of the post-Reconstruction Census Clause and avoids a serious

(Cont'd)

more accurate population count."); *Carey v. Klutznick*, 508 F. Supp. at 415 ("[I]n the area of apportionment where important constitutional rights are at stake, the Census Bureau may utilize sampling procedures but only in addition to more traditional methods of enumeration."). The difference between these two readings of the Census Act is immaterial to the matter before the Court, for the Secretary of Commerce has indicated an intention to use statistical sampling only to supplement, not to supplant, the traditional household survey.

constitutional question under section 2 of the Fourteenth Amendment. Accordingly, this Court should construe the Census Act to permit the Secretary of Commerce to incorporate statistical sampling techniques into the 2000 census in order to minimize both the overall undercount and the differential regional and minority undercounts inherent in the traditional census.<sup>27</sup>

### CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the decision below and to uphold the authority of the Secretary of Commerce to use statistical sampling in the 2000 census for purposes apportionment in order to correct for the historic undercount of African-Americans and other minority citizens.

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27. The court below suggested that the interpretation of the Census Act advanced in this brief would also raise a constitutional question, because the use of sampling might be inconsistent with the requirement in Art. I, sec. 2, cl. 3 for an "actual enumeration." See *House of Representatives*, 11 F. Supp. 2d at 98-99. As discussed in Part I(A)(1), *supra*, and as other briefs in support of appellants will no doubt explain at length, the phrase "actual enumeration" in Article I was never meant to require simply a counting of heads, but instead required Congress to conduct as accurate a count as possible to replace the population estimates used in the original apportionment of the House of Representatives. Thus, the "actual enumeration" claim asserted by appellees does not raise a substantial constitutional question, and the traditional rule of construction favors a reading of the Census Act that permits sampling.

The court below was, therefore, in error when it invoked the doctrine of "constitutional doubt" in support of its interpretation of the Census Act as forbidding statistical sampling. This Court has made clear that this rule of construction need not be applied unless the constitutional question that would be raised by a contrary construction of a statute would "lead a majority gravely to doubt that the statute is constitutional." *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1228 (1998).

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1998

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UNITED STATES DEPARTMENT OF COMMERCE,  
*Petitioner,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES,  
*Respondent.*

---

On Writ Of Certiorari To The United States  
District Court for the District of Columbia

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**BRIEF OF AMICUS CURIAE  
THE JAPANESE AMERICAN CITIZENS LEAGUE  
IN SUPPORT OF PETITIONER**

---

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**MOTION OF THE JAPANESE AMERICAN CITIZENS LEAGUE FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER**

The Japanese American Citizens League ("JACL") respectfully moves for leave to file the attached *amicus curiae* brief in support of Petitioner the United States Department of Commerce.

JACL has requested consent from both Petitioner United States Department of Commerce and Respondent United States House of Representatives to file this brief, and thus far has received consent from Respondent United States House of Representatives.

Petitioner Department of Commerce seeks review to overturn an order enjoining any use of statistical sampling in the decennial census to determine the population for purposes of congressional apportionment. The use of statistical sampling would dramatically increase the accuracy of the results of the year 2000 census. The methodology that otherwise would be employed, as urged by Respondent, would significantly and disproportionately undercount minorities, including Asian Americans. Such undercounting creates a risk of congressional malapportionment. The implementation of statistical sampling, as urged by both Petitioner Department of Commerce and JACL, would result in a census figure which more accurately and fairly reflects the number of minorities in the population, and thus would reduce the risk of congressional malapportionment.

JACL has a strong interest in the outcome of this case. Comprised of over 23,000 members, JACL is committed to ending discrimination against people of Japanese ancestry. As part of a minority group which was undercounted in the last census, JACL has a direct interest in having the year 2000 census conducted in a manner which will accurately count its members. An accurate count is vital for fair congressional apportionment and for other ancillary purposes, including the allocation of federal funds, for which the census data is used.



In the attached brief, JACL argues the need for this Court to decide that the Census Act permits the Department of Commerce to use statistical sampling to determine the population for purposes of congressional apportionment. In holding that the Census Act prohibits such use of statistical sampling, the district court ignored the Constitution's directive for an accurate census and the plain language of the Census Act. JACL believes that the attached brief will help the Court assess the significance of the issues raised by the district court's ruling.

Accordingly, *amicus* respectfully requests that this motion to file an *amicus curiae* brief in support of Petitioner be granted.

Dated: October 6, 1998

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## INTERESTS OF AMICUS CURIAE

This *amicus curiae* brief is submitted by the Japanese American Citizens League ("JACL")<sup>1</sup>. The JACL was founded in 1929 to fight discrimination against people of Japanese ancestry. It advances its mission through programs of citizenship, leadership, education, advocacy, and redress. It is the largest and one of the oldest Asian Pacific American organizations in the United States. The JACL is associated with a number of legislative accomplishments, including the passage of the naturalization act for Asian Americans (McCarran Act of 1952) and redress for Japanese Americans forced into prison camps during World War II (Civil Liberties Act of 1988).

The JACL has a vital interest in constitutional issues affecting its members, including equal protection and equal representation. As a representative of a minority group undercounted in the past decennial census, the JACL has a compelling interest in having the year 2000 census conducted in a manner that will provide a fair and accurate count of its members, as well as all other Americans. An accurate count is vital for the purpose of apportionment and for other important ancillary purposes, including the allocation of federal funds, for which the census data is used. Because the methodology urged by the Department of Commerce and the Bureau of the Census is designed to remedy the differential undercount of past censuses, the JACL submits this brief in support of Petitioner Department of Commerce.

## SUMMARY OF ARGUMENT

Under the Constitution, no member of a minority group may be counted as a mere fraction of a person. Yet this would be the inevitable result of affirmance of the District Court's order in this case.

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1. Pursuant to Supreme Court Rule 37.6, JACL represents that its counsel authored this brief in whole, and no person or entity other than JACL or its counsel made a monetary contribution to the preparation or submission of this brief.



The Constitution provides that Representatives shall be "apportioned among the several States . . . according to their respective Numbers." U.S. Const. art. I, § 2, cl. 3, *amended* by U.S. Const. amend. XIV. This clause originally provided that these "Numbers" were to be determined according to the "whole Number of free Persons" and "three fifths of all other Persons." Well over a century ago, the Fourteenth Amendment was passed to rectify this injustice, and changed the definition of "respective Numbers" for the purpose of apportionment to include "the whole number of persons in each State." U.S. Const. amend. XIV.

The status of minority persons as "whole persons" is threatened by the District Court's holding barring the use of recognized sampling methods in the conduct of the decennial census. See *U.S. House of Representatives v. U.S. Dep't. of Commerce*, 11 F.Supp.2d 76 (D.D.C. 1998). The Bureau of the Census, the lower courts and even this Court have recognized that the decennial census has regularly undercounted members of minority groups. The effect of such systematic undercounting is that each such minority person is counted as a fraction of a person. While the mechanism that results in the undercounting is different than what it used to be — no longer are the numbers of certain persons counted and then multiplied by three-fifths — the impact of the undercounting is no less real and no less pernicious. Although percentages higher than three-fifths may be seen as benign in comparison, they nevertheless fail to meet the constitutional requirement of equal representation.

Systematic undercounting of minority groups does not comport with the Constitutional command that "actual Enumeration" shall be made. U.S. Const. art. I, § 2, cl. 3 (emphasis added). It does not comport with the command of the Fourteenth Amendment that for the purposes of apportionment the count shall include "the whole number of persons in each State." It does not comport with the plain language of the Census Act, which allows the "use of sampling procedures and special surveys." 13 U.S.C. § 141(a).

Every American, regardless of race, has the right to be recognized by the government and counted for the purposes of apportionment. This Court should reject any attempt to ignore the plain Constitutional intent that the census be conducted as accurately as possible, and reject a construction of the Census Act which is both unreasonable on its face and would result in a discriminatory census count.

## ARGUMENT

### I.

#### AMERICANS OF ASIAN DESCENT, HAVING BEEN THE SUBJECT OF DISCRIMINATION UNDER COLOR OF LAW, HAVE A COMPELLING INTEREST IN ENSURING EQUAL REPRESENTATION.

Americans of Asian heritage are no strangers to discrimination under color of law. See, e.g., *People v. Hall*, 4 Cal. 399 (1854) (reversing murder conviction on the grounds that the testimony of Chinese witnesses was inadmissible against a free white citizen); *People v. Brady*, 40 Cal. 198 (1870) (holding ban on Chinese testimony constitutional under the 14th Amendment and the California Constitution); *In re Ahg Yup*, 1 F. Cas. 223, 224 (C.D. Cal. 1878) (holding that Chinese immigrant was ineligible for naturalization); *Fong Yue Ting v. United States*, 149 U.S. 698, 725 (1892) (upholding Chinese Exclusion Act); *Chae Chan Ping v. United States*, 130 U.S. 581, 610-11 (1889) (limiting ethnic Chinese from returning to United States after leaving country); *In re Saito*, 62 F. 126 (D. Mass 1894) (holding that Japanese were of the "Mongolian race" and therefore subject to exclusion from naturalization for the same reasons as Chinese); *Bessho v. United States*, 178 F. 245, 248 (4th Cir. 1910) (upholding immigration act limiting privileges of naturalization of Japanese); *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (upholding the denial of citizenship to Japanese); *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding California's Alien Land Law which restricted Japanese land

ownership); and *Gong Lum v. Rice*, 275 U.S. 78, 84 (1927) (upholding the "separate but equal" doctrine against an American born girl of Chinese descent).

Perhaps the most striking example of a racially motivated deprivation of rights in the United States in this century occurred when President Roosevelt signed Executive Order 9066, which allowed the internment of Americans of Japanese descent. Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943). Under this Executive Order, over 120,000 persons of Japanese descent were incarcerated in camps until the end of World War II, including 70,000 United States citizens. The internment was upheld in *Korematsu v. United States*, 323 U.S. 214 (1944), conviction vacated on writ of *coram nobis*, 584 F. Supp. 1406 (N.D. Cal. 1984). There have been enough such blots on American jurisprudence.

Americans of Asian descent include Asian Indian, Cambodian, Chinese, Filipino, Hmong, Japanese, Korean, Laotian, Taiwanese, Thai and Vietnamese. It is the common interest of all Americans of Asian descent that they, as well as all other Americans, be given their basic right of equal representation. That right depends on a fair and accurate census.

## II.

### THE CONSTITUTION DOES NOT PERMIT DIFFERENTIAL UNDERCOUNTING OF MINORITY GROUPS.

#### A. The Constitution Requires An Accurate Census, Not Any Particular Methodology.

The purpose of a decennial national census is to ensure that citizens are equally represented in Congress. An inaccurate census is inimical to this purpose, as it gives some citizens and groups of citizens a greater voice in government than others.

The plaintiffs in the action below suggest that the term "actual Enumeration" requires a literal head count. This is not supported by the historical record, the history of the census, or even logic.

Because the historical record is well discussed in other briefs before the Court, it need not be reviewed here. Suffice it to say, there is an absence of support for any claim that the founders were wedded to any particular census methodology. Indeed, the literal language of Art. I, § 2, cl. 3 belies any such claim, since it vests Congress with the authority to conduct the decennial census "in such Manner as they shall by Law direct." "In such manner" is obviously distinct from a command that the census be conducted in some particular manner.

The framers foresaw the need for a census because they knew the country would grow and change. The principle reflected in Article I is that an accurate determination of the population is the only reasonable basis for a fair and honest apportionment to reflect that growth.

While the Constitution allocates to Congress the power to determine the methodology for conducting the decennial census (power which Congress has in turn delegated to the Secretary of Commerce), the power of Congress of necessity has constitutional limitations. Congress does not have the power to institute a methodology which would necessarily result in an **inaccurate** enumeration in violation of the Constitution. Yet, the decision of the lower court appears to find exactly that — that the Census Act forbids the Bureau of the Census from using a methodology which the Bureau of the Census, the National Academy of Sciences, and even Congress' own General Accounting Office have endorsed as appropriate and necessary to prevent a repetition of the severe miscount which took place in the 1990 census.

The only reasonable conclusion is that the Constitution requires the use of the best methods possible in order to achieve the most accurate census possible. That judgment has been made after extensive and careful study by the body



charged with the responsibility of determining the methodology — the Bureau of the Census. Any attempt to subvert the considered, well-reasoned and scientifically sound judgment of the Bureau and to command that it use an inferior technique which guarantees the systematic undercounting of minorities must be considered constitutionally infirm.

#### **B. The Method Of Conducting The Census Has Changed Over Time.**

The Constitution did not specify the particular methodology to be used to conduct a census. As a matter of historical fact, the methodology employed in conducting the census has changed over the years. Originally, the count was conducted by United States Marshals. Later, special "enumerators" were hired. More recently, visits to dwellings were largely replaced by mailed census forms, and actual visits were generally limited to cases where the forms were not returned. See Bureau of the Census, *Report to Congress — The Plan for Census 2000* at 1 (August 1997) (hereinafter "*The Plan for Census 2000*").

There apparently never has been a real headcount — the sort of count where everyone is assembled in the town square and ticked off one by one. Rather, the census has been conducted by reference to dwellings, and the census has relied upon a resident who answers for the dwelling. Where a resident could not be contacted, the census has relied upon information provided by neighbors or other informants.

Of course, because the census is based on dwellings, not people, it is prone to error. It tends to overcount the affluent who may have more than one home, or children residing at college. It also tends to miss certain types of people, such as those who have no fixed residence, or whose economic or cultural circumstances lead to more than one family living in a single dwelling, or renters whose dwelling is simply not on the lists used.

Statistical adjustments are thus necessary to correct for these inherent errors, and the use of such techniques is hardly new. See *The Plan for Census 2000* at 23. They were

first used in the 1970 census. In 1970, counters were sent to a sample of houses that were considered vacant and the count found that a percentage of them were in fact occupied. This data was then used to extrapolate how many people actually lived in the rest of the nation's presumed-to-be vacant dwellings, and an appropriate adjustment was made to correct for that particular undercount. *Id.* Some form of statistical adjustment has been used in every census since 1970.

#### **C. Without Statistical Sampling, The Census Will Differentially Undercount Minorities.**

According to estimates, the most recent census in 1990 produced a severe miscount, with some 8.4 million Americans not counted, and some 4.5 million counted twice. Those missed were disproportionately minorities; those counted twice were disproportionately non-Hispanic whites.

According to the Bureau of the Census, the 1990 census missed 2.3% of Asians and Pacific Islanders, 4.4% of African Americans, 5% of Hispanics, and 12.2% of American Indians living on reservations, but only 0.7% of non-Hispanic whites. *The Plan for Census 2000* at 4. Unless the Bureau of the Census is permitted to use statistical sampling, a similar undercount in the year 2000 census is inevitable.

As the lower court acknowledged: "[U]ndercounting of certain groups relative to others, known as the 'differential undercount,' raises the possibility of congressional malapportionment, as jurisdictions with large numbers of undercounted persons may have a greater share of the total population than the census figures suggest." 11 F.Supp.2d at 79-80. In fact, since the distribution of minorities, and thus the undercount, is known to vary significantly by state, the undercount does more than raise "the possibility of congressional malapportionment" — it virtually guarantees it.

### III.

#### THE CENSUS ACT, READ CORRECTLY, PERMITS THE USE OF A STATISTICAL SAMPLING TECHNIQUE TO SUPPLEMENT PRIOR METHODS.

##### A. The Relevant Portion Of The Census Act Permits Statistical Sampling.

The Constitution grants Congress the authority to conduct a census. U. S. Const. art. I, § 2, cl. 3. Congress has, under the Census Act, delegated its authority to the Secretary of Commerce. 13 U.S.C. § 1 *et seq.*

The Census Act contains a single specific provision concerning the methodology which may be used to conduct the decennial census, Section 141(a). Section 141(a) provides in relevant part: "The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys."

Accordingly, under the plain language of the only statute which speaks specifically to the authority of the Secretary of Commerce to conduct the decennial census and the methodology which may be used, sampling is permitted.

In this lawsuit, it appears that Congress, or a certain segment thereof, seeks to utilize this Court to undermine the authority that Congress previously delegated to the Secretary of Commerce to use sampling procedures and special surveys consistent with the goal of conducting an accurate census. If indeed Congress believes that it has the authority to mandate a census procedure that will result in an inaccurate count, then it should amend the Census Act to withdraw the authority it previously granted to the Secretary to use sampling and statistical techniques.

##### B. Substantial Authority Supports An Interpretation Of The Plain Language Of The Census Act As Permitting Statistical Sampling.

As the lower court noted, many prior rulings support the conclusion that sampling is permitted. *See City of New York v. U.S. Dep't of Commerce*, 34 F.3d 1114, 1124-25 (2d Cir. 1994), *rev'd on other grounds, sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981). Rather than follow the sound logic of these decisions, the lower court has simply rejected this authority.

Consistent with established precedent and the Constitution, the Department of Commerce and the Bureau of the Census take the position that the Census Act permits statistical sampling. This Court previously stated that "so long as the Secretary's conduct of the census is 'consistent with the constitutional goal of equal representation,' it is within the limits of the Constitution." *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (citations omitted).<sup>2</sup>

Statistical sampling is directed precisely to accomplishing the constitutional goal of equal representation. Therefore, not only is the Secretary's proposed plan consistent with the Constitution, but the necessary implication is that the knowing use of an alternative census methodology which undercounts minorities is improper and offends the Constitution.

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2. There are at least two distinct differences from the issues presented to the Court in *Wisconsin* in regard to the 1990 Census. First, the presently proposed sampling technique represents a significant improvement from that which the then Secretary declined to use to adjust the 1990 census, and all authoritative sources agree with remarkable unanimity that this technique would result in a considerably more accurate census count. Second, in the present case the Secretary supports the technique, and the Court is being asked to deny the Secretary the discretion it previously approved.



#### IV.

### THE DECISION OF THE DISTRICT COURT DOES NOT WITHSTAND SCRUTINY.

#### A. The Lower Court's Statutory Construction Raises Serious Constitutional Problems.

In its decision, the District Court for the District of Columbia avoided consideration of the constitutional right of citizens to an accurate census. By ignoring the Constitution, the lower court committed prejudicial error. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466 (1989).

First, while Article I of the Constitution may give Congress broad authority in regard to the conduct of the census, that authority is necessarily limited to a census methodology that reasonably comports with the command of Article I that there be an "actual Enumeration," and with the command of the Fourteenth Amendment that the count for apportionment be based on "the whole number of persons in each State." The Constitution, therefore, does not permit the census to be conducted using a methodology known to be inaccurate, over a more accurate methodology. The underlying constitutional goal of an accurate census must be met.

Second, the knowing use of an inferior methodology that differentially undercounts minorities denies such minorities their right of equal representation. Strict scrutiny of a classification affecting a protected class is properly invoked where a plaintiff can show intentional discrimination by the Government. *Washington v. Davis*, 426 U.S. 229, 239-245 (1976). Here, the deliberate use of a methodology that is known to result in the undercounting of minorities, where the problem can be avoided, would be nothing less than purposeful discrimination by the Government.

Therefore, the lower court erred in construing the Census Act in a manner that ignores and offends the Constitution.

#### B. The Lower Court's Statutory Construction Is Wrong.

According to the lower court, two provisions of the Census Act are at issue, sections 141(a) and 195.<sup>3</sup> The lower court notes, but fails to discuss, the significance of the fact that Congress itself has plainly shown that the Census Act does not bar sampling to determine the population for the purposes of apportionment. 11 F.Supp.2d at 82.

In 1997, upon the Department of Commerce's announcement of its plan to utilize statistical sampling in the year 2000 census, Congress attempted to amend 13 U.S.C. § 141(a) to provide that: "notwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of apportionment of representatives of Congress among the several States." Supplemental Appropriations and Rescissions Act, H.R. 1469, 105th Cong., 1st Sess. (1997). The bill was vetoed by the President.

Congress had no basis to seek to amend the Census Act to forbid statistical sampling if it was already forbidden. This attempted amendment makes plain that Congress itself understands the Census Act as permitting the procedures now in dispute. Yet the lower court simply ignores this telling evidence of Congress's actual understanding of the Census Act.

The lower court also errs by placing the primacy of its construction on Section 195, when it is Section 141(a)

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3. Section 195 states: "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

which specifically and plainly permits sampling with respect to the decennial census: "The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population . . . in such form and content as he may determine, *including the use of sampling procedures and special surveys.*" (Emphasis added.) It is hard to imagine plainer language.

Further, the lower court errs in suggesting that Section 195 is more specific, and therefore controlling, over Section 141(a). 11 F.Supp.2d at 103 To the contrary, Section 141(a) is clearly the specific section as to the procedures permitted to the Secretary as regards the conduct of the decennial census. Section 195 mandates that statistical procedures "shall" be used for purposes other than the decennial census, and consistent with Section 141(a), simply leaves the use of such procedures discretionary in regard to the decennial census.

The lower court acknowledges that the "except . . . shall" structure of Section 195 is properly read in other sections of the United States Code, as the Department of Commerce contends, but asserts that "[c]ommon sense and background knowledge" dictate that in this instance it must be read differently. *Id.* at 100. This is not proper construction. Rather, common sense as well as correct construction should have informed the lower court that the plain language of Section 141(a) controls, and that Section 195 can and should be read consistently with Section 141(a).

The lower court claims to find support for its analysis in the *absence* of legislative history supporting the use of sampling in regard to counting for apportionment in connection with the 1976 amendment of Section 195. *Id.* at 101. It is not surprising that the lower court found little, because it looked in the wrong place. The plain language of Section 141(a) shows that sampling is permitted, and no legislative history is required to interpret this unambiguous provision.

Remarkably, the lower court also argues that: "It is a cardinal principle of statutory interpretation that dramatic

departures from past practices should not be read into statutes without a definitive signal from Congress." *Id.* at 100-01. The plain language of Section 141(a), however, does not require any interpretation; it plainly states that sampling is permitted in the decennial census.

Furthermore, the lower court makes an incorrect assumption that sampling represents a "dramatic departure." This is wrong for at least two reasons. First, the use of the sampling procedures in the year 2000 census is designed only to supplement the more traditional procedures, not to replace them. Second, statistical adjustments have been applied to past censuses. *See The Plan for the Census 2000* at 23. The procedure proposed by the Department of Commerce and the Bureau of the Census, with the advice and concurrence of the National Academy of Sciences, does not represent a dramatic departure, but simply an evolution.

#### **C. The Decision Of The Lower Court Is Illogical In That It Would Require A Dual Census.**

As further evidence of the illogic of the decision of the lower court, there can be no dispute that Section 195 mandates that "the Secretary shall . . . authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." The decennial census is used not only for apportionment, but also for the allocation of billions of dollars in federal funds as well as other purposes. Under the logic of the lower court, the Department of Commerce and Bureau of the Census would be forbidden to use statistical sampling for determining the population for the purposes of apportionment, but required to use statistical sampling (which is not merely feasible, but recommended) for other purposes. In other words, under this logic the census would need to be conducted in two different manners, one for counting for apportionment and one for counting for other purposes. This is obviously an illogical, not to mention costly and burdensome, result.



## CONCLUSION

The decennial census will, under the ruling of the lower court, differentially undercount minority groups. Article I of the Constitution mandates an accurate census. The plain language of the Census Act at Section 141(a) specifically permits the Secretary to utilize statistical sampling. Therefore, there can be no justification, Constitutionally or statutorily, for a court-imposed prohibition on a census methodology that will provide for a correct and accurate census. In the year 2000 census, each member of a minority group should be counted as a whole person. Minority groups are entitled to equal representation, and the ruling of the lower court must be overturned.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

*Appellants,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

*Appellees.*

On Appeal from the United States District Court  
for the District of Columbia

**BRIEF OF *AMICUS CURIAE* NAACP LEGAL  
DEFENSE AND EDUCATIONAL FUND, INC.  
IN SUPPORT OF APPELLANTS**

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Statement of Interest of *Amicus Curiae*\*

The NAACP Legal Defense and Educational Fund, Inc. (LDF) was incorporated in 1939 for the purpose, *inter alia*, of rendering legal aid free of charge to indigent "Negroes suffering injustices by reason of race or color." Its first Director-Counsel was Thurgood Marshall. The Legal Defense Fund has participated, either as counsel to a party or *amicus curiae*, in numerous cases in this Court involving the right of African Americans and other racial minorities to vote and participate in the political process on an equal and nondiscriminatory basis, *see, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964); *Thornburg v. Gingles*, 478 U.S. 30 (1986), and in cases involving the authority of government officials to take action against discrimination and its effects, *see, e.g., Bob Jones University v. United States*, 461 U.S. 574 (1983); *see generally N.A.A.C.P. v. Button*, 371 U.S. 415, 422 (1963) (describing Legal Defense Fund as a "firm" . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

This case implicates both of those longstanding concerns. The right to be counted in the decennial census is inextricably intertwined with the right to equal representation. Moreover, the eradication of discrimination depends critically on recognizing both the authority and the responsibility of government officials, like the Secretary of Commerce here, to take actions that advance fairness and equality.

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\*Pursuant to the Court's Rule 37.6, *Amicus* certifies that no portion of this brief has been authored by counsel for any of the parties and that no monetary contribution toward the preparation or submission of this brief has been made by any person or entity other than the *Amicus Curiae*. The parties' letters of consent to the filing of this Brief have been lodged with the Clerk.



### Introduction

The centerpiece of the Nation's democratic process is the right to equal representation. Article I, § 2 of the United States Constitution, as amended, provides that States be represented in Congress "according to their respective numbers," and this Court has long recognized a personal, Fourteenth Amendment right to an "equally effective voice" in the election of the government. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

Recognizing that the constitutional mandate of "equal representation for equal numbers of people," *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964), could only be realized if those people are accurately counted, the Framers made provision for a decennial census, U.S. Const. art. I, § 2, to be taken "in such Manner as [Congress] shall by Law Direct," *id.* Congress, in turn, has conferred broad power on the Secretary of Commerce, 13 U.S.C. § 141, who has the authority to take the decennial apportionment census "in such form and content as he shall determine," *id.*, § 141(a).

Census data supply the basis for reapportionment of the House of Representatives, *see* 2 U.S.C. § 2a, for drawing new congressional districts, *see Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (the census count "is the only basis for good faith attempts to achieve population equality"); *id.* at 731 ("Adopting any standard other than population equality, using the best census data available, would subtly erode the Constitution's ideal of equal representation") (emphasis supplied), and, as a practical matter, for State and local redistricting decisions, as well, *see* 13 U.S.C. § 141(c). And just as an accurate census is critical to achieving the constitutional ideal, deviations from accuracy, as the District Court in this case acknowledged, risk malapportionment and vote dilution. *See United States House of Representatives v. United States Department of Commerce*,

1998 U.S. Dist. LEXIS 13133, at \*4 (D.D.C. 1998) (three-judge court) (hereinafter cited as "*U.S. House*").

### a. The Differential Undercount and Its Consequences

There is no dispute that the census has, consistently, fallen short of its goal of providing an accurate, actual enumeration of the United States population. Rather, "[i]t is thought that [there has been] . . . a net 'undercount' of the actual American population in every decennial census." *State of Wisconsin v. New York City*, 517 U.S. 1, 6 (1996).

Moreover, these shortfalls have not been evenly distributed: groups that have historically been denied access to the political process -- African Americans, Latinos, and Native Americans among them -- have been found to suffer the highest rates of undercount. As the decision of the court below in this case recognized, this differential undercount (with its concomitant threats to equal representation) is "among the most troubling aspects of the census in the late 20th century," 1998 U.S. Dist. LEXIS 13133, at \*4 n.2; *see also Wisconsin*, 517 U.S. at 7 (acknowledging differential undercount of African-Americans in 1980 census); *City of Detroit v. Franklin*, 4 F.3d 1367, 1371 (6th Cir. 1993) (noting that in the 1990 Census African Americans and other minorities were undercounted to a greater degree than non-Hispanic whites); *Tucker v. Department of Commerce*, 958 F.2d 1411, 1412-13 (7th Cir. 1992) (same).

Finally, both the general undercount and the disparate undercounting of racial and ethnic minorities persist. In fact, both problems were found to have been of greater magnitude in the most recent census than they had been in its predecessor: "For the first time since the Census Bureau began conducting post-census evaluations in 1940, the decennial census was *less* accurate than its predecessor." *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at \*3 (quoting United States Department of

Commerce, Bureau of the Census, *Report to the Congress – The Plan for Census 2000* (revised August 1997) (“Census Report”) at 2); *The Challenge of the Count: Hearing before the House Committee on Government Reform and Oversight*, 104th Cong., 2d Sess. 4 (June 6, 1996) (Statement of Rep. Collins) (“For the first time in 50 years, the differential between the African-American undercount and the white undercount went up”). The Bureau has found that the 1990 Census excluded 4.4 percent of African Americans, 5.0 percent of Hispanics, and 12.2 percent of Native Americans living on reservations, as against only 0.7% of the non-Hispanic white population. See Census Report at 3-4. Indeed, each of the ten congressional districts most affected by the 1990 undercount has a minority population in excess of 62%:

District	Net Undercount		% African-American	% Hispanic
	Number	Rank		
NY 16	40,245	1	33.6	60.2
NY 11	36,123	2	70.4	11.6
NY 15	35,705	3	37.1	46.9
CA 35	35,604	4	41.3	43.0
CA 37	31,201	5	33.1	45.1
NY 12	30,561	6	8.9	58.6
NY 10	30,471	7	57.4	19.9
CA 32	30,174	8	39.1	30.4
CA 33	28,678	9	3.8	84.1
CA 20	27,982	10	6.1	56.3

Mark Girsh and Ken Strasma, *1990 Census Undercount by Congressional District*, September 20, 1998 (National Committee for an Effective Congress).

In these districts, the votes of minority citizens were given less weight as compared to districts in which residents were accurately counted, a result that this Court has held is tantamount to a direct barrier to the right to cast a ballot: “[The] right of suffrage can be denied by . . . dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds*, 377 U.S. at 555; cf. *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993) (noting danger of vote dilution that arises from “packing” minority voters in single district).

#### b. The Governmental Response

The undercount problem has been the subject of intensive study, both inside and outside the Census Bureau, for nearly three decades. In the years leading up to and immediately following the 1990 Census, serious consideration was given to using statistical methods to yield a more accurate population count, see *Wisconsin*, 517 U.S. at 7-12; 56 Fed. Reg. 33,582 (July 22, 1991), and official concern intensified as the troubling aspects of the 1990 count became known. Consequently, in 1991, Congress directed that the National Academy of Sciences be commissioned to study ways in which the government could achieve the most accurate census possible. See Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (1991), codified at 13 U.S.C. § 141 (note).

In addition to offering numerous other recommendations aimed at improving the quality of the census, the three panels convened by the Academy were unanimous on one point: that proper use of statistical sampling techniques would improve the accuracy of the Census. See *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at \*5. In light of these studies, as well as its “ninety



years of census-taking experience, meetings with the public in thirty cities, congressional input, and advice from no fewer than six advisory committees," *id.* at \*5-\*6, the Census Bureau developed its design for conducting the 2000 Census. In addition to its many planned efforts to improve the efficacy of conventional census-taking techniques, *see id.* at \*6 n.3, the Bureau has indicated its intention to make use of statistical sampling methods that will make the census more accurate.

Pursuant to a statutory provision enacted into the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2480-87 (1997), plaintiff-appellee United States House of Representatives brought suit challenging the legality (on both constitutional and statutory grounds) of the Bureau's planned course. Without reaching the House's constitutional arguments, the court below accepted the House's argument that any use of statistical sampling in connection with apportionment was irreconcilable with the strictures of the Census Act, 13 U.S.C. §§ 1 *et seq.*

As we demonstrate below, that decision was incorrect as a matter of statutory interpretation, is especially troubling in light of the constitutional purposes the census must serve and threatens to result in a decade of unequal representation and minority vote dilution that the Apportionment Clause, the Fourteenth and Fifteenth Amendments and the Due Process Clause of the Fifth Amendment proscribe.

### Summary of Argument

The question this case presents is whether the Census Act, 13 U.S.C. § 1 *et seq.*, must be read as requiring that the Secretary of Commerce conduct a census that (1) in the expert judgment of the Census Bureau, would not be accurate; (2) would result in the abridgement of the votes of minority citizens; and (3) would lead to inevitable and wholly unjustifiable

inequalities in apportionment. The court below, relying on isolated and concededly ambiguous language in one statutory section, ruled that Congress had, in fact, compelled such an extraordinary result. That decision reflects two critical errors.

First, ordinary rules of statutory interpretation establish that the statute that the Court is called upon to construe includes no such troubling limitation on the Secretary's ability to conduct a fair and accurate census. Rather, the provision specifically conferring authority on the Secretary to "take a decennial census of the population," 13 U.S.C. § 141(a), also includes express and clear provision for the Secretary to use "sampling procedures" -- a grant of power that would be a nullity if the reading adopted below were correct. It is in light of this provision (and § 141(b), which further clarifies that the "tabulation" made under subsection (a) is the one to be used for "apportionment of Representatives in Congress") that the "except for . . ." clause that so troubled the court below, *see* 13 U.S.C. § 195, may properly be understood: not as a bar on all apportionment-related use of statistical sampling, but as an exemption from an otherwise mandatory obligation to use such methods -- and as evidence of Congress's longstanding commitment to census accuracy.

Because this is the only interpretation that is fully consistent with the statutory text, this Court's statutory interpretation cases teach that the judicial inquiry "is at an end." *See, e.g., Sullivan v. Stroop*, 496 U.S. 478, 485 (1990). But even if the statute as a whole could be said to be ambiguous with respect to apportionment-related sampling (as opposed to §195, which, standing by itself, undeniably is ambiguous), the principles announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), would oblige the Court to accept the Secretary's interpretation. *Chevron* requires that "substantial deference [be] accorded to

the interpretation of the authorizing statute by the agency authorized with administering it," *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (citing *Chevron*, 467 U.S. at 844), a rule that applies even when "[t]he court . . . conclude[s] that the agency construction was not the only one it could permissibly have adopted . . . or even the reading the court would have reached" as a matter of first impression, *Chevron*, 467 U.S. at 843 n.11. This obligation applies with special force here, because the statute at issue has been read by this Court to confer Congress's "virtually unlimited discretion" on the Secretary, see *Wisconsin*, 517 U.S. at 19; see also *id.* at 20 (Secretary's decision "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census"). The court below erred seriously in refusing to give effect to this principle.

Indeed, even absent deference, the interpretation accepted below — whereby Congress uniquely and categorically withheld authority to use of "the statistical method known as 'sampling'" in conjunction with apportionment — would make scant sense. So long as the Secretary is authorized to use other statistical techniques (which have precisely the same alleged "vices" attributed to the "method known as 'sampling,'" see *infra*) and is otherwise vested with broad discretion to adjust the census as he sees fit, see generally *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the prohibition read into the statute by the court below serves no purpose other than to hamper the taking of a census that — in the judgment of the Census Bureau and of an extraordinary array of outside statistical experts — would be both more accurate and more fair. See *Wisconsin*, 517 U.S. at 19-20 (review under the Apportionment Clause must not lose sight of "the constitutional goal of equal representation") (quoting *Franklin*, 505 U.S. at 804).

Nor is the result reached below compelled by the language — or the *lacunae* — of the pertinent legislative history

or by the need to steer clear of any serious constitutional question. To the contrary, the committee reports explaining the 1976 amendments to the Census Act are fully supportive of the Secretary's authority, and familiarity with events leading up to those amendments make the construction given below seem that much more strained. As for "constitutional avoidance," the argument that the Constitution's reference to an "actual Enumeration," U.S. Const. art. I, § 2, rules out use of reliable and valid statistical methods of ascertaining the population proves to be insubstantial — and therefore provides no basis for giving the Act an unnatural and illogical construction.

In fact, the serious constitutional considerations are all on the other side of the argument, and that is the second error of the decision below: failure to "keep[] in mind the constitutional purposes of the census," *Wisconsin*, 517 U.S. at 20, in construing the Act. See *Wesberry*, 376 U.S. at 18 (there "is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives"). The court below treated as irrelevant the fact that the census planned by the Commerce Department has been determined to be more fair and more accurate in all constitutionally relevant respects, and less likely to yield discriminatory results than any alternative. In light of the purpose of the census, it would be extraordinary to construe the Secretary's authority to conduct an accurate census more narrowly than his discretion not to do so, see *Wisconsin*, especially because the former course implicates the Executive's independent responsibility to advance equality and nondiscrimination. See *Bob Jones University v. United States*, 461 U.S. 574 (1983). Indeed, a census conducted with unjustified disregard for expert and administrative judgments concerning accuracy would raise serious constitutional questions, even under the forgiving standard announced in *Wisconsin*.



## ARGUMENT

### I. Straightforward Principles of Statutory Construction Foreclose the Interpretation Given the Census Act by the Court Below

The decision below took an extremely unorthodox and circuitous approach to construing the pertinent statute. Even while professing to be giving effect to the unambiguous "plain meaning" of the statutory text, *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at \*68 n.11, the District Court in fact conceded that the language of the lone clause supporting its interpretation, 13 U.S.C. § 195, is susceptible to two critically different readings: one, authorizing (but not requiring) sampling techniques in conjunction with apportionment and the other prohibiting them. *See id.* at \*75-76 (noting that permissive reading is correct in "some instances," but that prohibitory one is right "more often than not"). To resolve that ambiguity, the court turned not to the text of other provisions of the same statute or to the interpretation of the executive agency charged with administering it, *see infra*, but rather to the text and legislative history of an earlier version of the provision. Interpreting that history as ruling out use of statistical sampling in conducting (or correcting) the decennial census, the court then returned to the current, amended version of the provision, holding that while its text had been changed, there was insufficient clamor evident in the legislative history of the 1976 amendments to infer that Congress had, in fact, backed away from (what the court took to be) its prior position. Only then did the court look to the current (amended) version of 13 U.S.C. § 141, concluding that the provision could not mean what it says, *i.e.*, that the Secretary is authorized to take the decennial census "in such form and content as he shall determine, including the use of sampling procedures," because that reading would be in conflict with the "more specific" language in 13 U.S.C. § 195,

which, according to a venerable canon of construction, must control. *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at \*88.

### A. The Plain Terms of the Statute Authorize the Use of Statistical Sampling to Correct the Inaccuracies in the Apportionment Census

This was not the right way to read a federal statute. Once it is recognized that the "except . . . shall" statutory language may be construed either as permissive -- as it is in other provisions of the U.S. Code, *see, e.g.*, 16 U.S.C. § 460w-4 -- or prohibitory, the proper response is not to embark on the sort of "detective[]" work, *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at \*80, for which the judiciary is ill-equipped (*i.e.*, discerning the "background knowledge" of the legislators who enacted the provision). Rather, the court should seek the answer in the text and structure of other provisions of the same statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988).

Such an exercise produces a satisfying result in this case: while § 195 is ambiguous, § 141 is not. It straightforwardly authorizes use of "sampling procedures" in conjunction with the "decennial census," 13 U.S.C. § 141(a), and indeed makes explicit that the census it authorizes is the one that must be used for apportionment purposes, *id.*; *see also id.*, § 141(b). Giving this provision its plain meaning neither conflicts with nor renders superfluous the "except for" language of section 195. *Cf. United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("a statute must, if possible, be construed in such fashion that every word has some operative effect"). Rather, that clause performs an important purpose, providing that sampling, although mandated in connection with other of the Secretary's census responsibilities, is discretionary with respect to apportionment-related enumeration.

The reading settled on below does not have this virtue. Rather than construing the two (simultaneously enacted and amended) provisions as consistent with one another, it finds them to be in conflict, and, declaring § 141 to be the "less specific," deprives it of any legal significance. *But see Pittsburgh & L. E. R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989) ("when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective") (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *Stone v. Internal Revenue Service*, 514 U.S. 386, 397 (1995) ("when Congress acts to amend a statute, we presume that it intends its amendment to have real and substantial effect").

#### B. The Secretary's Determination Is Owed Deference

In fact, the unconventional methodology used by the court below would have been inappropriate even were there not a provision like § 141 at hand to resolve the ambiguity inherent in the phrasing of § 195. This Court's cases require that, in the absence of clear textual direction, a court must accept the construction of the Executive official charged with administering the statute, unless that interpretation is unreasonable. *See Chevron*, 467 U.S. at 843 (deference principles apply in cases of both statutory silence and ambiguity). Indeed, the Court's decisions in *Wisconsin* and *Franklin* articulated, if anything, an even more deferential standard, directing that "so long as the Secretary's conduct of the census is 'consistent with the constitutional language and the constitutional goal of equal representation,'" it must not be overturned. *See Wisconsin*, 517 U.S. at 19-20 (citing *Franklin*, 505 U.S. at 802); *see also* 517 U.S. at 20 (Secretary's decision whether or not to adjust "need bear only a reasonable relationship to the accomplishment

of an actual enumeration of the population, keeping in mind the constitutional purpose of the census").<sup>1</sup>

In a single footnote, *see U.S. House*, 1998 U.S. Dist. LEXIS 13133, at \*68 n.11, the court below declared this obligation to be inoperative in this case, on the ground that (1) the plain meaning of the statute is clear; (2) the Secretary had reversed his position on the issue; and (3) he had not "amply justified his changed interpretation with a reasoned analysis," *id.* (quoting *Rust v. Sullivan*, 500 U.S. at 187, and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983)).

The three reasons proffered do not state a valid basis for disregarding the *Chevron* rule in this case. First, as explained above, the District Court decision itself acknowledged that the meaning of even the most helpful statutory provision cannot be said to "plainly" rule out all use of sampling. As for the second and third distinctions, *Chevron* rejected the assertion that agency interpretation is undeserving of deference whenever "it represents a sharp break with prior interpretations," 467 U.S. at 862; *see also Smiley v. Citibank*, 517 U.S. 735, 742 (1996) ("change is not invalidating, because the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"), and, as is explained below, any suggestion that the Secretary's decision to incorporate statistical methods in the 2000 Census was not supported by "reasoned analysis" is wholly untenable.

As an initial matter, the challenged interpretation reflects no recent shift in the administrative understanding of the statute,

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<sup>1</sup>In *Wisconsin*, the Court treated the statutory grant of power (and discretion) to be essentially coextensive with that conferred on Congress by the Constitution. *See* 517 U.S. at 19; *but cf. id.* at n.10 (declining to address possible relevance of § 195).



see *Smiley*, 517 U.S. at 742 (noting that a "[s]udden and unexplained change" is more likely to be adjudged "arbitrary and capricious"). The view that §195 does not foreclose use of sampling to correct for undercounting was taken by the previous administration, which regarded the decision whether or not to use sampling data, see *Wisconsin*, as one committed (by § 141) to the Secretary's discretion. See 56 Fed. Reg. at 33,605-06. That view, in turn, reflected the unanimous interpretation of federal courts that had examined the statute, see *City of New York v. U.S. Department of Commerce*, 739 F. Supp. 761, 767 (E.D.N.Y. 1990) ("It is no longer novel, or in any sense, new to declare that statistical adjustment of the decennial census is both legal and constitutional"), *rev'd on other grounds*, 34 F.3d 1114 (2d Cir. 1994), *rev'd on other grounds sub nom. State of Wisconsin v. New York City*, 517 U.S. 1 (1996); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), and that of the Department of Justice, the GAO, and the Department of Commerce Inspector General. See Census Report at 54.

Second, the decision to reconsider use of a statistical method in light of evolving scientific knowledge is the sort of policy change that should excite the least judicial suspicion under any circumstances. Compare *Rust*, 500 U.S. at 187 (relying in part on administration's "shift in attitude against the 'elimination of unborn children by abortion'"); cf. *Chevron* 467 U.S. at 863 (noting that challenged decisions arose "in a technical and complex arena"). Indeed, *Chevron* teaches that informed agency rulemaking "must consider varying interpretations and the wisdom of [existing] policy on a continuing basis." 467 U.S. at 863 (emphasis supplied). Previous administrations gave serious consideration to these

methods, ultimately determining that further testing and refinement were needed before they should be used in conjunction with apportionment.<sup>2</sup>

Indeed, it is not easy to fathom how an observer familiar -- as the opinion of the court below shows it to have been, see 1998 U.S. Dist. LEXIS 13133, at \*5-6 -- with the lengthy, rigorous and scholarly consideration given the undercount correction question by the Secretary, the Census Bureau, and numerous outside advisors could possibly find the ultimate decision not to rest on "reasoned analysis." As the lower court itself reported: The use of sampling methods to improve the accuracy of the census has been under intensive study within the Census Bureau and in the statistical community for more than a decade; public hearings were held in thirty cities; the views of no fewer than six federally chartered outside advisory committees -- representing, among others, the American Statistical Association, the American Population Association, and the American Economic Association -- were solicited. See Census Report at 8-9.

Nor was this reconsideration instigated (or accomplished) unilaterally by the Executive Branch: Congress enacted the law providing for the National Academy of Sciences (NAS) to study "the means by which the Government could achieve the most accurate population count possible," including "the appropriateness of using sampling techniques, in conjunction with basic data-collection techniques or otherwise,"

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<sup>2</sup>The main theme of Secretary Mosbacher's decision not to approve adjustment was that sampling should be studied further before being implemented. That has now been done. A second major concern was "distributive accuracy," i.e., that the sample conducted in 1990, although undeniably more accurate at the national level, was not so clearly superior as among the States and at the sub-State level. See also *Wisconsin*, 517 U.S. at 22 (noting that sample used other States to determine a State's apportionment). That criticism has been addressed directly in the plan for 2000.

see the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (1991) -- a process that resulted in unanimous judgment of three separate NAS panels that sampling was appropriate. Thus, by almost any measure, the Secretary's determination to incorporate statistical sampling methodology to improve the accuracy of the 2000 census must rank among the most well-informed and carefully considered decisions in the recent history of the Executive Branch; the deliberative process in *Rust* -- and almost any other instance of agency decisionmaking -- appears capricious in comparison. On no even possibly correct reading of *Chevron* and *Rust*, then, can this rigorous and prolonged study of the question -- enlisting countless outside experts in the design, analysis, and implementation of the Census Plan -- be said to constitute an insufficiently "reasoned basis" for the Secretary's decision.

**C. The Decision Below Erred in Giving Dispositive Weight to (Relative) Legislative Silence**

A distinctive feature of the conclusion reached by the court below is that it did not rest primarily on positive legislative history supporting its thesis -- *i.e.*, any explicit indications in the committee reports that the 94th Congress understood the amended § 195 as an absolute ban on considering statistical sampling in connection with apportionment -- nor even on congressional silence. To the contrary, the relevant legislative materials are fully consonant with the Secretary's interpretation, and they provide no positive support for the contrary position. See, e.g., S. Rep. No. 94-1256 at 1 (1976) (explaining that § 141(a) contains "new language . . . to encourage the use of sampling in the taking of the decennial census"); see also *id.* at 6 (explaining that § 195 "as amended strengthens congressional intent that, whenever possible, sampling shall be used"); H.R. Rep. No. 94-944 at 6 (under amendments, sampling should be used "whenever possible").

Instead, the ruling below places unusual faith in its judgment that the "watchdog . . . did not bark in the night," *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at \*80 (quoting *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) and *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)), *i.e.*, a perception that the legislative history of the 1976 amendments is neither as extensive nor as explicit as would be expected had Congress jettisoned the categorical prohibition the court believed it to have established two decades earlier (not to mention the alleged "two hundred year tradition" of not using statistical methods).

There are two problems with this approach. First, as a general matter, the many reasons -- both constitutional and empirical -- for hesitating before relying on legislative history over statutory text, see *Shannon v. United States*, 512 U.S. 573 (1994); *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law"); see generally *Conroy v. Aniskoff*, 507 U.S. 511, 519, 527-28 (1993) (Scalia, J., concurring), only multiply when it is "silence" in the legislative history that is held out as trumping expression in the text. There is no requirement that Congress make its views known in any form other than an enacted statute, see U.S. Const. Art. I §7; see generally *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 419 (1992) ("Suffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning").<sup>3</sup> The perils are

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<sup>3</sup>*Accord Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496-97 n.13 (1995) ("congressional silence, no matter how 'clanging,' cannot override the words of the statute"); *Stone v. Internal Revenue Service*, 514 U.S. at 397 ("when Congress acts to amend a statute, we presume that it intends its amendment to have real and substantial effect"). Cf. *Perez v. United States*,



most acute, however, where, as here, the argument for disregarding statutory text is not based on silence in the legislative history, but rather on a perception that Congress was not as loud as it might be expected to have been. See *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at \*83.<sup>4</sup>

Second, consideration of general validity aside, the “bark” hypothesis has particularly little explanatory power in this case. The theory assumes that, before amending the Act in 1976, Congress understood the limitations of § 195 to be as stringent as the court below believed them to be based on its reading the text and legislative history of the 1957 version. In fact, the Congress that amended the Census Act in 1976 had more to consider than the cold text of the 1957 version and its accompanying committee reports. The understanding of the Committee that would eventually report out the 1976 amendments as to the scope of the Secretary’s authority was informed by its experience overseeing the conduct of the 1970 Census, which had -- notwithstanding § 195 -- used two statistical methods similar to those proposed for 2000 (albeit less sophisticated or extensive) and had added more than 1,500,000 people to the total generated by “traditional” “headcount”

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402 U.S. 146, 156 (1971) (“Congress need [not] make particularized findings in order to legislate”).

<sup>4</sup>*Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991), relied upon below, involved a starkly different situation. There, the purpose of 1982 amendments (and of the disputed statutory provision, in particular) was to expand the reach of the Voting Rights Act, a theme that pervades the legislative history and the text of the Act, making the argued-for implied limitation highly improbable. By contrast, the thrust of the 1976 Amendments was wholly in the direction of favoring use of sampling.

methods.<sup>5</sup> See *Hearings before the Subcommittee on Census and Statistics of the Committee on Post Office and Civil Service*, 91st Cong., 2d Sess. 6 (1970); Report on Accuracy of the 1970 Census Enumeration, H.R. Rep. No. 91-1777, 91st Cong., 2d Sess., at 22 (1971); *Programs to Reduce the Decennial Census Undercount*: Report to the House of Representatives Committee on Post Office and Civil Service by the Comptroller General of the United States, GAO Rep. No. GGD-76-72 (1976).<sup>6</sup>

Rather than “bark” -- and object to methods that seemingly transgressed the hypothesized statutory and constitutional barriers to statistical adjustment -- the Committee

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<sup>5</sup>It is not wholly correct to refer to the methods for conducting the census as either “traditional” or a “headcount.” As for the former, the 1970 census had, in a distinct break with the past, turned to mail-in “self-enumeration,” after nearly two centuries of door-to-door visiting by census-takers. See Pub. L. No. 88-530, 78 Stat. 737 (1964) (eliminating requirement of in-person visit by enumerator). As for the “headcount,” the image of a physical count obscures the extent to which self-reporting and other forms of hearsay, see *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at \*8 (noting use of “proxy data” in 1990 census), rather than in-person, one-by-one “reckoning” have long been the basis for the enumeration.

<sup>6</sup>First, the Bureau, concerned that a substantial share of the housing units reported to be “vacant” were, in fact, occupied, undertook a “post vacancy re-check,” whereby 13,546 of the units recorded as vacant were re-surveyed. When it was found that 11% of this sample were, in fact, occupied, the Bureau decided that it would deem 11% of the all units rated vacant to be “occupied,” as well. Then, to determine the number of additional people these housing units would contribute, the Bureau resorted to a statistical method known as “imputation,” whereby each unit would be considered to be occupied by the same number of people found in households with similar characteristics. This effort resulted in the addition of 1,069,000 people to the 1970 census count. A second effort, known as the “Post Enumeration Post Office Check,” used a similar methodology to correct for the undercount of rural populations in 16 southern states, resulting in the addition of another 480,000 people to the final census figure.

that drafted the provisions that ultimately became law in 1976 applauded the Bureau's efforts. The Committee pronounced itself "most impressed with the effectiveness of the Post Office Check as a check on the adequacy of the enumeration coverage in the conventional door-to-door enumeration areas" and urged further appropriations for similar programs in the future. See Report on Accuracy of the 1970 Census Enumeration, H.R. Rep. No. 91-1777, at 22, 37, 41.

This background in turn, suggests a wholly different and more plausible explanation for what the court below found so telling: the relative absence of hue and cry accompanying the 1976 amendments. If (whatever the initial intent of the 84th Congress) the 94th Congress interpreted § 195 as a limitation not on the Secretary's authority to use statistical methods to supplement (and correct) data gathered through more traditional means, but as, at most, affecting his freedom to substitute less accurate measures for the (assumed) more accurate, but more cumbersome physical collection methods, amendments confirming that understanding or even committing all apportionment-related sampling decisions to the Secretary's discretion would not have elicited much of a "bark."

**D. A Complete Prohibition on the "Statistical Method Known as 'Sampling'" -- and Only that Method -- Would Make No Sense**

Indeed, this reading suggests an answer to one of the central difficulties facing the statutory interpretation upon which Plaintiff has insisted: If Congress had been concerned (as was argued below) with respecting an alleged distinction between "actual enumeration" ("counting") and "estimation," what reason would there be to limit the "prohibition" of § 195 to "the statistical method known as 'sampling'"? Other methods of correction -- such as imputation -- share precisely the same "vice" attributed to "sampling": generalizing from (sophisticated

and statistically valid) assumptions about homogeneity of subpopulations.<sup>7</sup>

The most plausible basis for distinguishing "sampling" from these other methods is that the others were believed to yield exclusively accuracy-improving adjustments, whereas sampling may have been seen as having a more dual nature, laudably increasing accuracy when used as a "check" on more imprecise methods, but decreasing it if used as a substitute for the Department's traditional (and presumed-to-be more accurate) methods. Such a reading brings the main thrust of § 195 into line with Congress's prime responsibility under the Constitution: to assure an accurate census. So understood, the statute distinguishes apportionment from other activities -- not for the purpose of limiting the Secretary's discretion to use scientifically valid methods to improve the accuracy of the apportionment census -- but rather to emphasize that, with respect to this one paramount responsibility, accuracy should not be sacrificed.<sup>8</sup>

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<sup>7</sup>The only alternative would be to construe the alleged prohibition on "the statistical method known as 'sampling'" as extending to all statistical methods, including, for example, imputation. But that is an interpretation that the statute's language cannot possibly bear -- especially when read in light of the 94th Congress's familiarity with the Census Bureau's then-recent use of imputation.

<sup>8</sup>Plaintiff has raised the specter that, under Defendants' reading, nothing in the statute would prevent the Secretary from adopting a census based entirely on statistical methods. That is a red herring. First, that hypothetical is far removed from the census actually planned for 2000 -- which, among other things, provides for multiple, individual contacts with every known household in the Nation and which represents only an incremental change from 1990 -- and one supported by substantial scientific consensus. As a practical matter, there is no such consensus for a fundamentally different methodology, and any such drastic change would require the cooperation of Congress (which would have to appropriate funds and retains ultimate authority to "direct" the manner in which the census is taken) and the approval of the judiciary, which would



### E. The Constitutional Argument Against the Planned Census Is Insubstantial

Indeed, the only arguable virtue of reading the statute the way the decision below did is that it relieved the court of responsibility for determining whether the Constitution, by its own force, prescribes that the census entail some sort of physical headcount (and only that). See *Rust v. Sullivan*, 500 U.S. at 191 (noting principle that “a statute must be construed, if fairly possible, so as to avoid . . . grave doubts” as to its unconstitutionality). That “constitutional” argument, however, is not serious enough to warrant the Court’s avoiding it by constructing a very different -- and far more constitutionally troubling, see *infra* -- statute than the one Congress actually enacted. Cf. *Rust*, 500 U.S. at 191 (“avoidance of a difficulty will not be pressed to the point of disingenuous evasion”) (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)).

The crux of the claim that the purported prohibition on statistical sampling is of constitutional magnitude rests on an interpretation of the phrase “actual Enumeration.” The intended meaning of “actual Enumeration” becomes quite clear when considered in the full context of the constitutional language:

Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers. . . . The actual Enumeration shall be made within three Years after the Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. . . . [U]ntil such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three,

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review the Secretary’s decision for consistency with the standard announced in *Wisconsin*.

Massachusetts eight, Rhode Island and Providence plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

As the context makes clear, the phrase “actual Enumeration” is used not to prescribe (or proscribe) a particular manner for taking the census but rather to distinguish the contemplated decennial census from the first, provisional allocation of House seats -- a political compromise that was neither based on any attempt to determine accurately the populations of the States, nor reflective of any single, precise principle of apportionment.

In the court below, the Plaintiff gathered numerous definitions of “actual” and “enumerate” extracted from contemporaneous dictionaries, in the service of an argument that the Framers understood the two words together to bind their descendants to a particular method of census-taking. But there are numerous problems with this sort of “originalism.”<sup>9</sup> First, the term “enumerate” does not appear in the text of the Constitution, while the word that does, “enumeration” (which is often used to mean a total, without regard to the method used

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<sup>9</sup>Indeed, it is arguably not originalism at all. The apportionment for which the 2000 Census will be used is not the one contemplated in Article I, but rather the one provided for in the Fourteenth Amendment. See 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring) (noting that practices at time of ratification of Fourteenth Amendment may be “more relevant” than those of the eighteenth century in interpreting Free Speech Clause, as “incorporated”). There is no evidence that the Framers and ratifiers of the Fourteenth Amendment considered census-taking methodologies, but there can be little basis for believing, in light of the other commitments contained in that Amendment and contemporaneously enacted legislation, that they would prefer, let alone prescribe a method that would lead to the diminution the rights of individuals only recently and belatedly recognized as “whole persons” in the eyes of the law. See generally Br. Amici Curiae of the Brennan Center for Justice, *et al.*

to arrive at it), appears to have been a last-minute, unexplained substitute for "census." More important, while there was broad and divisive debate about the basis for representation in the House -- with apportionment according to population emerging as the dominant principle -- there is no record of discussion about the manner in which the population would be ascertained, a silence reinforced by the textual delegation to Congress of authority to "direct" "the manner" by which the decennial census would be conducted.

## II. The Census Act May Not be Interpreted in Isolation from its Constitutional and Statutory Context

This Court's cases affirm that no census may be conducted that is not "consistent with the . . . constitutional goal of equal representation." *Wisconsin*, 517 U.S. at 19-20. Although the straightforward principles of statutory interpretation discussed above suffice fully to establish the correctness of the Secretary's understanding, the court below also committed a serious error in failing to "keep[] in mind," *id.* at 20, the purposes of the census. Had the decision done so, it would not have treated as irrelevant the acknowledged inaccuracies that would result from overruling the planned Census (and the constitutionally troubling consequences that would ensue) and would have construed the Executive's authority to take measures to prevent and correct discrimination and inequality to be no less broad than the discretion not to do so upheld in *Wisconsin*.

### A. The Executive Branch has Distinct Power and Responsibility to Assure Political Equality

The Secretary's authority to use accuracy-enhancing statistical techniques derives important support from the unique and constitutionally sensitive purposes that the census data have come to serve. In addition to their mandatory role in the allocation of seats in the House of Representatives, 2 U.S.C. §

2a, the population figures derived from the 2000 census will, for all practical purposes, determine States' drawing of congressional districts, *Karcher*, 462 U.S. at 738 (the census count "is the only basis for good faith attempts to achieve population equality"); *id.* at 731 ("adopting any standard other than population equality, *using the best census data available*, would subtly erode the Constitution's ideal of equal representation") (emphasis supplied), and will affect the apportionment of political power at every level of State and local government, as well. See 13 U.S.C. § 141(c). The consequences of inaccuracy -- and especially differential inaccuracy -- are thus extraordinarily serious, and the Secretary's authority should not lightly be construed as preventing him from acting to prevent such inequitable and constitutionally troubling results.

In addition to the real and persistent possibility that a State with a disproportionately high undercount will not be represented in Congress "according to" its "numbers," see *Wisconsin* -- a condition that is in palpable tension with the plain words of the Constitution, the hazards of the undercount at the congressional district level are even more ominous and pervasive. The magnitude of the distortions inherent in the differential undercount, see, e.g., table *supra* p. 4, far exceed the sorts of modest deviations from strict population equality that have been held to offend the equal representation principle of Article I. See *Karcher v. Daggett* (rejecting congressional redistricting plan with total deviations as small as .70 percent, where better plans with smaller population deviations were presented and where the variances were not sufficiently justified as "necessary" to achieve legitimate state interests); see also *Wells v. Rockefeller*, 394 U.S. 542 (1969) (rejecting plan with total deviation of 13.1 percent); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (rejecting redistricting plan with total deviation 5.97 percent); *White v. Weiser*, 412 U.S. 783, 790 (1973)



(rejecting plan with total deviation of 4.13 percent); see generally *id.* (congressional districts must be "as mathematically equal as reasonably possible"); *Karcher*, 462 U.S. at 732 ("As between two standards -- equality and something less than equality -- only the former reflects the aspirations of Art. I § 2").

It would be an odd rule that required the Secretary to generate data that, in his informed judgment and that of outside experts, were not accurate and that (due to known undercounts) would lead inexorably and unnecessarily to constitutionally intolerable departures from equal representation. Just as government officials have the power to take measures to avoid becoming "passive participant[s]" in unconstitutional conduct, see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989), the Secretary must be presumed to have at least the discretion (if not the duty) to avoid decisions that will lead to unconstitutional State action. Cf. *California State Senate v. Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992) ("if the State knows the census data are unrepresentative, it . . . should utilize noncensus data . . . in the redistricting process").

Fulfilling this role is all the more compelling since the individuals most likely to be excluded from an uncorrected census count are members of the racial and ethnic minority groups that have historically been denied full participation in the political process. Indeed, Congress, by enacting the Voting Rights Act of 1965, 42 U.S.C. §§ 1971 *et seq.*, committed the government to "rid[ding] the country of racial discrimination in voting," *South Carolina v. Katzenbach*, 383 U.S. 301, 365 (1966), a national commitment that extends to prohibiting all practices and procedures that result in members of minority groups being denied an equal opportunity to elect candidates of their choice, *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Given the acknowledged strong state interest in drawing congressional districts that do not offend Section 2, see *Bush v. Vera*, 116 S. Ct. 1941, 1951-1952 (1996); *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995); *Shaw v. Reno*, 509 U.S. 630, 642 (1993); see also *Vera*, 116 S. Ct. at 1969 (O'Connor, J., concurring), this Court should be duly hesitant to interpret the Secretary's authority as not extending to steps necessary to provide accurate information so as to avoid statutory violations. *Voinovich v. Quilter*, 507 U.S. at 153-54 (1993) (explaining danger that minority group will be "packed" so as to dilute voting strength). See generally *Bob Jones University v. United States*.

#### B. An Inaccurate Census Would Raise Serious Constitutional Questions

Although the Secretary's ability to conduct a correct and fair census plainly implicates his constitutional power, it also raises serious questions as to his constitutional duty. Although this Court held in *Wisconsin* that Article I, as amended imposes no absolute duty to correct an undercount -- even a differential undercount, the question presented in *Wisconsin* was fundamentally different from the one that would arise were the Secretary compelled to conduct a census in 2000 that, in his and experts' judgment, was unjustifiably and differentially inaccurate.

In *Wisconsin*, the Court upheld as a constitutionally permissible exercise of the Secretary's authority his decision not to rely on data generated through statistical sampling. Key to the Court's holding was that while Article I's goal of "equal representation" necessarily contemplates an accurate census, it does not express a preference for a particular type of accuracy. Because the executive decision challenged in *Wisconsin* had invoked concerns about "distributive" *i.e.*, State-level, inaccuracy, the Court concluded that there was no basis for

adjudging it less "consistent with the constitutional goal of equal representation" than one that favored accuracy at the national level. *See* 517 U.S. at 18 ("we can see no ground for preferring numerical accuracy to distributive accuracy. The Constitution provides no instruction on this point").

Here, however, there is no similar choice between equally "constitutionally permissible course[s]." The "polestar of equal representation" *Wisconsin*, 517 U.S. at 13 (quoting *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 463 (1992)), would favor a census objectively more accurate in each of the constitutionally relevant respects, and there would be serious doubt as to whether a different one could meet even the deferential constitutional standard.

### Conclusion

The decision below went to unfortunate lengths to detect a "limitation" on the Secretary's authority that (1) defies the plain meaning of the Census Act; (2) disregards this Court's decisions regarding judicial deference; and (3) is inconsistent with a common-sense understanding of legislative intent. Because the Secretary's decision to conduct a more fair and accurate census is wholly consistent with his statutory and constitutional responsibilities and is specifically intended to further goals of equal representation and nondiscrimination that are at the core of our constitutional democracy, the judgment of the District Court must be reversed.

Respectfully submitted,

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

*Appellants,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**BRIEF OF *AMICI CURIAE* AMERICAN FEDERATION OF  
STATE, COUNTY AND MUNICIPAL EMPLOYEES;  
STATE LEGISLATIVE POLICY INSTITUTE; NOW  
LEGAL DEFENSE AND EDUCATION FUND; AMERICANS  
FOR DEMOCRATIC ACTION; AND NATIONAL  
COUNCIL OF LA RAZA, IN SUPPORT OF APPELLANTS**

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## QUESTIONS PRESENTED

1. Whether the instant case, which involves a suit filed by the United States House of Representatives challenging the Secretary of Commerce's current plan for the year 2000 census, presents a justiciable controversy satisfying the requirements of Article III of the Constitution.

2. Whether the Census Act, 13 U.S.C. § 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

3. Whether the Census Clause of the Constitution, Article I, Section 2, Clause 3, which requires Congress to conduct an "actual Enumeration" of the population, prohibits the use of statistical sampling in determining the population for the purpose of apportioning Representatives among the States.



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## INTERESTS OF THE *AMICI CURIAE*<sup>1</sup>

The American Federation of State, County and Municipal Employees (AFSCME) is the largest union of public employees in the country, with approximately 1.3 million members employed in state and local governments throughout the nation. As employees of state and local governments, AFSCME's members have a strong interest in the production and use of accurate census data.

The State Legislative Policy Institute is a non-profit research, education, and advocacy organization of state legislators, labor unions, and other groups focusing on state and federal policies, information, and analysis. State legislators of course have a prime responsibility in redistricting at both the congressional and state level. The Institute thus has an interest in a fair and accurate Census 2000.

The NOW Legal Defense and Education Fund (NOW LDEF), founded in 1970 by leaders of the National Organization for Women, is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and to secure equal rights. NOW LDEF believes that an accurate census is crucial to equal political representation for all women, including black and Hispanic women who in the past have been disproportionately undercounted. In addition, an accurate census will permit the equitable distribution of resources for federal programs designed to reach women and children.

Americans for Democratic Action (ADA), founded in 1947, is the nation's oldest independent liberal advocacy group. Throughout its history, ADA has been concerned about the participation and representation of minorities in the American political process and demographic calculations as a necessary

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<sup>1</sup> Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for a party. No person, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.



basis for sound policy planning by federal, state and local governments.

The National Council of La Raza (NCLR) is the nation's principal constituency-based Hispanic organization, serving all Hispanic subgroups in all regions of the country through a network of over 225 affiliate organizations. As a disproportionately poor and traditionally undercounted population, Hispanics have a great stake in the debate over how the census counts the U.S. population. As Hispanics make up an increasingly large proportion of the nation's workers, taxpayers, voters, and school children, accurate census data is essential to ensure they receive their fair share of representation in Congress, as well as equitable levels of public resources.

### STATEMENT OF THE CASE

1. The question presented is whether the Bureau of the Census may, consistent with two centuries of historical tradition, use the best available scientific methods to correct for inaccuracies and omissions in collected data as it prepares its "enumeration" of the nation's population for purposes of apportioning the seats in the House of Representatives among the several States. Appellee, the United States House of Representatives ("appellee" or "the House"), would have this Court require that the quarter-billion residents of our highly-mobile and complex society be counted without the use of statistical and other non-counting methods to correct for inaccuracies or omissions in collected data. But such methods have been routinely used in the conduct of every modern census. If accepted, the House's argument therefore would work a dramatic change in the law, restricting not only the specific uses of sampling at issue here but also a range of scientific methods employed in the past to ensure that the census is as accurate as possible.

In practical terms, this case may well determine whether the principle of one person, one vote will be an empty promise or a

meaningful guarantee. By constitutional command, the census is used for determining how many seats each State shall have in the House of Representatives. See U.S. Const. Art. I, § 2; U.S. Const. Amdt. XIV. In consequence, it is also used in determining how many votes each State shall have in the electoral college. See U.S. Const. Art. II, § 2, cl. 2.

As a technical matter, the census data that will be used for apportioning House seats are the only data at issue in this case. The statutory and constitutional arguments made by the House of Representatives address — and purport to address — only the procedures that may be used by the Secretary of Commerce in "the determination of population for purposes of apportionment of Representatives in Congress among the several States." 13 U.S.C. § 195 (emphasis added); accord U.S. Const. Art. I, § 2, cl. 3. The only relief sought in this case — or granted below — was declaratory and injunctive relief preventing use of scientific sampling methods "for the purpose of apportioning Representatives among the several States." See Complaint at 13-14; Jurisdictional Statement ("J.S.") Appendix ("App.") 67a (order).

Indeed, it is undisputed that the Census Act *requires* the Secretary, "if he considers it feasible," to "authorize the use of the statistical method known as 'sampling' in carrying out" all the other provisions of Title 13 of the U.S. Code. 13 U.S.C. § 195.<sup>2</sup> These provisions include those relating to the preparation and use of census data for purposes of congressional redistricting — that is, the drawing of congressional district lines within each state after the seats in Congress have been apportioned among the States — and for state and local redistricting. 13 U.S.C. § 141(c).

Nonetheless, constitutional principles beyond the apportionment of seats in Congress should inform consideration

<sup>2</sup> See, e.g., House of Representatives' Memo in Support of Sum. Jud. in Dist. Ct. ("House S.J.") at 3-4 (making this point); *id.* at 25 (same); *id.* at 40 (same).

of this case. A decision by this Court prohibiting the Bureau of the Census from using scientific statistical sampling to correct errors in the collected data used for purposes of apportionment could ultimately impede the ability of the Bureau to use such data — “the best population data available,” *Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (citation omitted) — for other purposes as well. Like the requirement of fair apportionment, the constitutional principle announced by this Court that, among the congressional districts *within* each state “each person’s vote is to be worth as much as another’s,” *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964), depends for its vitality upon the accuracy of the data employed. Likewise, because census data is used in state and local legislative redistricting, the production of inaccurate data could render the one person-one vote promise of this Court’s decision in *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), nothing more than a teasing illusion.

In addition, of course, census data is used for allocating federal funds, and for administering various federal programs. More than 100 federal programs use population-related data to distribute billions of dollars annually in federal funds, including child welfare services, food assistance, programs for the aging, maternal and child health services, programs to combat drug abuse, family violence prevention programs, child care funding, and education grants.<sup>3</sup> Census data is also used by the private sector for everything from marketing strategies for financial services to determining where to place retail stores. Equal representation, a fair distribution of resources, and even the most

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<sup>3</sup> See, e.g., Congressional Research Service, *Federal Programs Using Some Aspect of Population as a Qualifying or Limiting Factor to Dispense Program Funds or Services* (Memorandum to House Government Reform & Oversight Committee dated April 9, 1998) (listing 164 federal programs with estimated FY 1998 obligations of over \$75 billion); U.S. Bureau of the Census, *Preparing for Census 2000: Subjects Planned for Census 2000, Federal Legislative and Program Uses* (March 1997); GAO, *Formula Programs: Adjusted Census Data Would Redistribute Small Percentage of Funds to States* (GAO/GGD-92-12) (Nov. 1991) (listing 100 federal programs).

efficient operation of our economy, thus depend on an accurate census.

2. If the Census Bureau is forbidden to use statistical methods to correct errors in its collected data, the predictable result will be unwarranted inequalities among Americans in political power and the distribution of federal resources. As this Court is aware, “[s]ome segments of the population are ‘undercounted’ to a greater degree than are others.” *Wisconsin v. New York*, 517 U.S. 1, 7 (1996). Members of minority groups, children, rural populations, the poor, renters, transients, and members of similar groups are undercounted at a higher than average rate. Some higher income individuals who, for example, may have residences in more than one state and may therefore be counted in two or more locations, have been *overcounted*. The result has been dubbed the “differential undercount.” *Id.* at 6.

As this Court has explained:

Since at least 1940, the Census Bureau has thought that the undercount affects some racial and ethnic minority groups to a greater extent than it does whites. . . . In the 1980 census, for example, the overall undercount was estimated at 1.2%, and the undercount of blacks was estimated at 4.9%.

*Id.*

The problem grew worse in the 1990 census, the first since 1940 in which overall coverage did not improve over that in the previous census.<sup>4</sup> Studies indicate that the 1990 census missed approximately 8.4 million people — largely poor people, children, and minorities — and double-counted or incorrectly included 4.4 million others, for a net undercount of 4 million.<sup>5</sup>

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<sup>4</sup> See GAO, *Decennial Census: 1990 Results Show Need for Fundamental Reform* 19-20 (June 9, 1992).

<sup>5</sup> U.S. Bureau of the Census, *Report to Congress: The Plan for Census 2000* at 44 (Aug. 1997) (“Report to Congress”).



The net undercount was 4.4% for blacks, 5.0% for Hispanics, 2.3% for Asians and Pacific Islanders, and 4.5% for American Indians, compared with 0.7% for non-Hispanic whites.<sup>6</sup> In short, the census missed about one person in 20 for Hispanics and African Americans, but less than one in 100 for whites. The difference between the black and nonblack estimated undercounts was the largest since 1940.

The differentially undercounted are real people whose neighborhoods, cities, counties and States (in the congressional apportionment context) consequently have been deprived of the representation, and federal resources, to which they are entitled. Individuals in States with a large undercounted population are likely not to receive equal representation in the House of Representatives; individuals in States with a large overcounted population are likely to get more than their share.

Newly available data permit a concrete examination of the undercounting problem, using information released by the Bureau of the Census in July 1998 adjusting 1990 population data using the Bureau's 1990 quality check post-enumeration survey (PES).<sup>7</sup> For the Court's convenience, a listing of the net undercount or overcount in each U.S. Congressional District is attached as Appendix A.<sup>8</sup>

The data show that the congressional district with the most serious undercounting problem, New York's 16th District, had a net undercount of more than 40,000 persons, out of an actual total of 620,583. In this district, approximately 6.5 percent of the population was not included in the Census Bureau's tabulation

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<sup>6</sup> See *id.* at 4; see also GAO, *Decennial Census: 1990 Results Show Need for Fundamental Reform* at 21.

<sup>7</sup> The PES was an adjustment favored in 1987 by the Director of the Census Bureau, but ultimately rejected by the Secretary. See *Wisconsin v. City of New York*, 517 U.S. at 10-11.

<sup>8</sup> This listing includes a note explaining the methodology of its preparation and the sources of the data it includes.

of the national population. See App. A2. Not surprisingly, this district is over ninety percent racial minority, including 60.2% Hispanic and 33.6% African American. *Id.* The data show that the undercounting problem is overwhelmingly centered in heavily minority districts. By contrast, 36 districts have net undercounts of fewer than 1,000 voters, and 21 of these in fact have net *overcounts*. See App. A13-14. Not surprisingly, these districts are disproportionately *non-minority*. *Id.*

### SUMMARY OF ARGUMENT

The House argues that the only permissible census is one in which all the data is derived from counting singly every individual who can be located. The text of the Census Act and the Constitution, and the consistent practice since the time of the Framing, belie this assertion. If this Court accepts the House's invitation and imposes such a rule by judicial command, it will work a profound change in the law, prohibiting not only the Census Bureau's uses of scientific sampling that are at issue in this case, but also its use of other non-counting techniques that have long and routinely been used by the Bureau to produce the most accurate census data possible.

The judgment of the district court is wrong as a matter of law. To begin with, under separation of powers principles and the constitutional doctrine of Article III standing the instant suit — brought by Speaker Gingrich “for and on behalf of the House of Representatives”<sup>9</sup> — is not justiciable.

On the merits, the district court erred in its construction of the Census Act. The proposed use of sampling is entirely consistent with its text. Indeed, the decision below represents a marked departure from historical practice under the Census Act.

Finally, if this Court should reach the constitutional question

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<sup>9</sup> Departments of Commerce Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998 (“the 1998 Appropriations Act”), §209(g), Pub. L. 105-119 (Nov. 26, 1997), J.S. App. 79a.

concerning the meaning of the Census Clause of Article I, §2, cl.3, both text and history make clear that the use of statistical adjustment to correct for inaccuracies and omissions in the data collected for purposes of apportionment of seats in Congress is not constitutionally prohibited.

## ARGUMENT

### I. Under *INS v. Chadha*, a Single House of Congress May Not Bring Suit to Obtain a Narrowing Construction of its Own Delegation of Authority.

Congress has delegated to the Secretary in 13 U.S.C. § 141(a) its authority to determine the manner in which the census shall be taken. The House of Representatives now brings suit on statutory and constitutional grounds arguing that the Secretary has exceeded the scope of this legislatively delegated authority.

Under the separation of powers principles articulated in *INS v. Chadha*, 462 U.S. 919 (1983), a single House of Congress may not bring a suit such as this which seeks a narrowing construction of a legislative delegation of policymaking authority to an administrative agency. If Congress believes that the agency has "exceeded [legislatively delegated authority] . . . it is open to . . . the power of Congress to modify or revoke the authority entirely." *Id.* at 954-55 n.16. *Chadha*, however, makes clear that Congress can exercise that power "in only one way; bicameral passage followed by presentment to the President." *Id.* at 954-55. Otherwise, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.* at 955.

Here a House of Congress seeks — apparently for the first time in its history, see J.S. App. 41a-45a (describing other situations in which a House of Congress has initiated legislation) — to go into an Article III court to obtain an authoritative judicial construction of its own delegation of policymaking authority. Since this suit would, if successful, have "the purpose and effect of altering the legal rights, duties and relations of

persons," *Chadha*, 462 U.S., at 952, by invalidating the Secretary's exercise of delegated authority, it may not be undertaken by a single House of Congress any more than could the single-chamber legislative veto invalidated in *Chadha*. This suit is not justiciable. "[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress thereafter can control the execution of its enactment only indirectly — by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986).<sup>10</sup>

Congress can, of course, effectively bestow upon *third parties* the power to challenge in court an agency's construction of the scope of its legislatively delegated authority. This happens routinely when a statute creating rights in third parties contains ambiguous language that implicitly delegates to an executive department authority to construe that language in the first instance. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (recipients of Title X funds argue that "regulations exceed the Secretary's authority under" the language of the statute); *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (health and environmental groups argue that statutory term "stationary source" of air pollution cannot bear the construction given it by the EPA). This very case arguably involves the Secretary's exercise of just such delegated authority. See *infra* at pp. 24-26 (if 13 U.S.C. § 195 renders 13 U.S.C. § 141 ambiguous, the Secretary's interpretation is entitled to deference). What Congress may not do, without running afoul

<sup>10</sup> Individual members of Congress in their official capacities and one or both Houses of Congress have of course been held to have power to invoke the jurisdiction of Article III courts in certain circumstances, even to challenge the constitutionality of executive action. See, e.g., *Barnes v. Kline*, 759 F.2d 21, 28-29 (D.C. Cir. 1985) (finding that the U.S. Senate and individual members of the House had standing to sue). Although these holdings have been controversial, see, e.g., *Moore v. United States House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984) (Scalia, J., concurring in result), they do not raise the same separation of powers concerns present here.



of separation of powers principles, is attempt to bestow, by any form of language, such power to bring suit upon a single House of Congress.

Thus, as this Court recently explained in *Raines v. Byrd*, 117 S. Ct. 2312, 2321-22 (1997), although "a plaintiff with traditional Article III standing" may bring a suit in which the Court may pass on the lawfulness of the action of one branch that finds itself in a dispute with another, "the restricted role" of "Article III courts" under "[o]ur regime[]," *id.* at 2322, means that such courts may not "adjudicate" the legality of one branch's actions in a suit brought by its adversary branch seeking resolution of this type of "confrontation[] between one or both Houses of Congress and the Executive Branch." *Id.* at 2321. See also *id.* at 2324 (Souter, J., concurring in judgment) ("interbranch controversy" should be addressed only if a "private suit" is brought "by a party from outside the Federal Government").

The restriction on suits seeking a narrowing construction of legislative delegations of policymaking authority precisely parallels the restriction upon congressional delegation of such authority announced in *Chadha* itself. Congress has been permitted to delegate authority — essentially legislative in character — to the Executive Branch, to the independent agencies and, indeed, even to private persons. See, e.g., *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 577 (1939); *Currin v. Wallace*, 306 U.S. 1 (1939). What it may not do is delegate that power to one house of Congress. See *Chadha*, 462 U.S. at 987 (White, J., dissenting) (under the majority's decision, "the legislature can delegate [legislative] authority to others but not to itself"); see also *id.* at 953 n. 16 (opinion of the Court) (congressional authority to delegate power to administrative agencies provides no support for authority to delegate legislative veto power to itself).

Before bringing this suit, Congress had already failed to obtain a presidential signature on legislation that would, in fact, have overridden the Secretary's construction of the scope of his

delegated authority. See J.S. App. at 6. Congress may now fear that it will not be able to obtain the two-thirds majorities necessary to override the President's veto. But one branch's inability to act as some or even most of its members would like it to can have no bearing on the applicability of separation of powers principles. Cf. *Clinton v. City of New York*, 118 S. Ct. 2091, 2103 (1998) (Congress may not give the President a portion of its Article I power in an attempt to provide a check on its own unwise exercise of its power; repeal of portions of statutes must be wrought in conformity with the procedures set out in Article I).

## II. Because the House of Representatives Itself Will Suffer No Injury Even from the Use in Congressional Apportionment of Census Data Compiled in a Manner Inconsistent With Law, It Lacks Standing to Bring This Suit.

This case is also not justiciable because the House of Representatives as a body lacks the "injury in fact" that forms the "irreducible minimum" of Article III standing. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 392 (1988).<sup>11</sup>

A. The House has pressed the claim, and the court below concluded, that it would suffer injury from its own unlawful composition. The House argued in the district court that it has "an obligation to ensure its seats are 'apportioned among the several states . . . according to their respective Numbers.' Art. I, §2, cl. 3." Opposition of Plaintiff United States House of Representatives to Defendants' Motion to Dismiss in Dist. Ct. at 20. An apportionment of congressional seats among the States

<sup>11</sup> The 1998 Appropriations Act, §§ 209(d) and 209(d)(3) (paragraph break omitted), J.S. App. 77a, declares that "[f]or purposes of this section an aggrieved person . . . includes either House of Congress." But "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 117 S. Ct. at 2318 n. 3.

based upon census data derived in contravention of the Census Act or the Constitution, it argued, would "wrongly allocate[]" some of its seats, causing it injury as an institution. See *id.* at 20-22.

The wrongful allocation of a seat in Congress to one or another State, however, would do no injury to the House of Representatives *as a body*. Accepting the plaintiffs' allegations as true, the Congress will be composed in part of Representatives from States that will be harmed, in part of Representatives from States that will be helped, and in part of Representatives from States that will not be affected, by the supposedly unlawful apportionment. But the Congress *as a body* will not be injured even if, because of a wrongful determination of the number of people in each State, one or another State has fewer — and one or another State greater — than the appropriate number of Representatives.

A malapportioned Congress, rather, may be the *instrument* of injury to others: those States that are under-represented, their representatives, and the voters whose votes are diluted. This Court has acknowledged these parties' injuries, granting standing to such States, voters, and their representatives, in cases alleging an erroneous apportionment of Representatives among the several States. See *Franklin v. Massachusetts*, 505 U.S. 788, 790 (1992) (suit by the State of Massachusetts and two of its registered voters arguing that it was entitled to one more, and Washington State to one less, Representative in Congress); *Department of Commerce v. Montana*, 503 U.S. 442, 446 (1992) (suit brought by the State of Montana, its Governor, Attorney General and Secretary of State on behalf of its voters, and by its two Senators and Representatives, arguing that it was entitled to an additional seat in Congress).<sup>12</sup>

<sup>12</sup> The injury to representatives this Court recognized in the *Montana* case appears to have been the injury they suffered in their capacity as representatives of the voters of an injured State; they included both Senators and Representatives. Once seated, the only complaint a Member of

A contrary rule, that the House itself is injured by a wrongful apportionment of its own seats, would lead to absurd results. For under the principle urged by the House, not only would the House be able to bring a suit such as the instant one or *Franklin* or *Montana* alleging that a particular apportionment works (or would work) a wrongful inequality in representation between States, but also suits under *Wesberry v. Sanders*, 376 U.S. 1 (1964), charging that a particular State's inclusion of unequal populations among its congressional districts works a similar inequality between districts. Wrongful apportionment of a State's congressional seats among the citizenry of that State has an identical effect upon Congress's "lawful composition" J.S. App. 20a, as would a wrongful apportionment of congressional seats among the States. See *Wesberry* at 20 (Harlan, J., dissenting) (observing that the requirement announced in that case — "equal representation in the House for equal numbers of people" — "casts grave doubt on the constitutionality of the composition of the House of Representatives").

Yet this Court has long held that the right to an equally weighted vote in congressional elections is "designed to prevent debasement of voting power and diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). It would require a novel justification for these rules — and would open the door to a wide range of suits — were this Court to conclude that a House of Congress is injured by its own malapportionment.

*Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187

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Congress might have about the number of seats apportioned to his or her State would have to do with the strength of his or her vote within the State's delegation should the House be required to elect the President because there is no majority in the Electoral College. See U.S. Const. Amdt. XII (each State has one vote). Ironically, a Member from an *overrepresented* State might be able to claim his or her vote was diluted with respect to this procedure by the unlawfully large congressional delegation representing his or her State.



(1972), on which the district court relied even though it did not deal with malapportionment, J.S. App. 20a-22a, is not to the contrary. In that case, a state senate intervened and brought an appeal to challenge a district court's order reducing its size from the statutorily-mandated 67 members to 35 members. But a legislative body denied the benefit of operating with the full number of members to which it is entitled is injured in a way a body whose seats have been doled out unevenly is not. In such a case, the unlawfully composed body is not only the instrument of harm to voters; it is itself harmed, both in the additional responsibilities each of its reduced number of members are likely to have to assume, and in the very quality of its deliberations.

B. The "informational injury" upon which the district court also relied would similarly sweep far too broadly. Myriad statutes require the delivery of information to Congress. *E.g.*, 10 U.S.C. § 113(c) (annual report of the Secretary of Defense on the "expenditures, work and accomplishments" of the military). If alleged maladministration of the law in a way that would alter the information received by Congress were enough to grant standing, Congress would have a powerful new tool for interfering with the execution of the laws by the Executive branch. Recognition of this type of injury would permit Congress to give itself a pervasive role in the execution of the laws through, for example, the simple expedient of requiring executive officials to report their decisions to Congress.

In light of the separation of powers principles that underlie the doctrine of standing, see Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894-95 (1983), this Court's words in a different context are applicable here:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important

constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.

*Lujan v. Defenders of Wildlife*, 504 U.S. 559, 577 (1992). See also *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (power to sue to enforce the law is beyond the scope of Congress's rightful authority to obtain information in aid of its power to legislate).

### III. The Historical Practice Undermines The House's Arguments on the Merits.

The House's arguments on the merits all take as their point of departure the assumption that a "traditional enumeration" includes only a "headcount" of every person who can be "located." House of Representatives' Memo in Support of Sum. Jud. in Dist. Ct. at 25. The House argues that "enumeration" has always been understood to require that all "information be derived from counting, not statistical estimation." House of Representatives' Reply Memo in Support of Sum. Jud. in Dist. Ct. at 32. Consequently, the House argues, our nation must satisfy itself with a census that we know inaccurately undercounts the population.

The historical practice, however, shows that the census has never depended solely on a "one-by-one" counting method for collecting data. The statutes providing for the first censuses did not even require that data be collected by a personal visit to each household. In addition, since the very beginning of the census, mechanisms have been included for the correction of inaccuracies in the collected data. The censuses during the last half-century have included statistical methods for the imputation of individuals in the national population count that are indistinguishable in principle from the scientific sampling that the Department of Commerce plans to use in Census 2000. The only difference is that the scientific methods at issue here are *more* reliable than those used in the past.

A. The first six censuses were done not so much by

"headcount" as by "house count." "[T]he census unit to be counted was the household." Margo Anderson, *THE AMERICAN CENSUS* 13 (1988). Even then, with respect to the first two censuses, there was no requirement that the data be obtained in any particular way. In particular, an examination of the early statutes makes clear that the requirement that data for each household be obtained by an actual inquiry at every house — a requirement abandoned more than thirty years ago, in 1964, in favor of mail-in forms — was itself a late innovation, imposed only at the time of the third census in 1810.

The statute authorizing the first census, which required federal marshals "to cause the number of the inhabitants within their respective districts to be taken," Act of March 1, 1790, 1 Stat. 101, did not impose any limit on the method by which those charged with the enumeration were to obtain their data.<sup>13</sup> The statute providing for the second census again included no instruction concerning the method by which data were to be collected. See Act of Feb. 28, 1800, 2 Stat. 11.

Only in the *third* census, undertaken pursuant to the Act of March 26, 1810, 2 Stat. 564, did Congress specify for the first time that "the said enumeration shall be made by an actual inquiry at every dwelling-house, or of the head of every family within each district, and not otherwise." *Id.* The absence of this language from the earlier statutes is telling. And indeed, the very implication of the word "otherwise" at the end of the quoted text is that an "enumeration," as that word was understood during the

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<sup>13</sup> The marshals were simply required to take an oath to "well and truly cause to be made, a just and perfect enumeration and description of all persons resident within my district." Act of March 1, 1790, 1 Stat. 101. They were also authorized to hire assistants who had to take a similar oath. *Id.* The statute did require every person "more than sixteen years of age . . . belonging to any family within any division of a district . . . to render to such assistant of the division, a true account, *if required*, to the best of his or her knowledge, of all and every person belonging to such family respectively," *id.* §6, at 103 (emphasis added), but did not specify the manner in which the assistant was to ascertain how many persons were in each household.

twenty years after the Framing, *can* be undertaken by means other than house-by-house inquiry.

By 1850, the responsibilities of census takers were relaxed. See Act of May 23, 1850, 9 Stat. 428, 430, as amended by the 1850 Census Act, the Act of August 30, 1850, 9 Stat. 445. Census takers were permitted to collect data concerning the members of each family, "by inquiries made of some member of each family, if any one can be found capable of giving the information, but if not, then of the agent of such family." *Id.* By 1929, Congress instructed census takers to collect information from neighbors when no competent person could be found at a family's usual place of abode 13 U.S.C. § 201 (1952 ed.) (codifying Act of June 18, 1929, c.28, §§1, 4, 46 Stat. 21).

More recent censuses have departed even further from the "headcount" model the House claims is required. For the 1970 census, the requirement of a "house count" was eliminated and mail-in, mail-back forms were used. See Pub. L. 88-50, 78 Stat. 737 (1964).

B. Moreover, the census has, from the beginning, included mechanisms to correct for inaccuracies in the collected data. The statute authorizing the first census required preliminary results to be posted in "two of the most public places within [the relevant part of the district], there to remain for the inspection of all concerned." Act of March 1, 1790, § 7, 1 Stat. 101, 103. This was intended to provide an opportunity for correction of inaccurate data included in the schedule. Anderson, *supra*, at 14. The statute authorizing the second census again included the "posting" mechanism to correct for errors in the collected data, see Act of Feb. 28, 1800, 2 Stat. 11, as did every such statute passed through 1840 census. See, e.g., Act of March 3, 1839, § 7, 5 Stat. 331, 335.

In early censuses, raw data was revised and corrected by census clerks at their discretion. It was "many decades before the federal government, as well as private statisticians, codified rules for correcting and evaluating the census schedules." Anderson, *supra*, at 25. In 1840, Congress authorized census



clerks to "correct" the returns. *Id.* at 26; see Act of Feb. 26, 1840, § 9, 5 Stat. 368, 369. If data were missing, the clerks had "to make discretionary decisions" about "whether to interpolate the information, write to the assistant marshal and ask for the missing information, or simply omit it." Anderson, *supra*, at 43, 49. In 1851, for example, many of the census returns from California were burned or lost. The Census Office estimated the population of California at 165,000, although returns existed only for 92,000 persons. *Id.* at 46.

In this century, statistical methods have also been incorporated into the census. "Since at least 1940, statistical imputation has been used when an enumerator knew that a housing unit was occupied, but could not obtain information on the number of persons living in that unit." *Report to Congress* at 23. In such situations, the Bureau *imputes population counts* by using completed census questionnaires from nearby units to generate imputed information for the unit for which it cannot gather data. See *Young v. Klutznick*, 497 F. Supp. 1318, 1333 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981). This extrapolation is based on an assumption that people in proximate housing units have similar characteristics. The number of persons imputed to the unit (and the assumption the occupant has not been counted elsewhere) is not based on any person's actual knowledge.

Whether deemed "correction," "adjustment," or "augmentation" of collected data, this longstanding practice of imputation — which would be prohibited under the House's view — fatally undermines the House's arguments on the merits. The 1970 population figures used for apportionment of seats in Congress included about 900,000 imputed persons from housing units which the Bureau found to be occupied but from which it could not determine a population count.<sup>14</sup> In 1980, the Bureau

<sup>14</sup> Statement of L. Nye Stevens, Director, Government Business Operations Issues, General Government Division, GAO, Before the Subcomm. on Census on Population, House Comm. on Post Office and Civil Service, *Components*

imputed about 762,000 persons into the census numbers, which resulted in the shifting of a congressional seat from Indiana to Florida.<sup>15</sup> In 1990, about 54,000 imputed persons were included in the population data.<sup>16</sup>

C. Other statistical methods have been used as well. In 1970, the Bureau used scientific statistical sampling in its National Vacancy Check, a statistical program designed to account for persons actually living in housing units that the Bureau, at the end of its initial counting efforts, had classified as "vacant." Through a sample of 15,000 housing units, the Bureau calculated that just over 1,000,000 persons actually lived in housing units initially designated as vacant.<sup>17</sup> It then distributed these 1,000,000 persons among the States in proportion to the distribution of vacant units. Although it claims to object to the use of sampling, the House does not even challenge the plan to use a similar National Vacancy Check in the 2000 census.

Scientific sampling methods were also used to add to the 1970 count after a Postal Service records check of all housing units in the rural portions of 16 southern states, the area the Bureau believed was subject to the highest undercount. Some 480,000 persons were added to the census count as a result of this scientific sampling procedure.<sup>18</sup>

Congress was well aware of these statistical techniques and approved them. For example, with respect to the National Vacancy Check, the Census Director testified before Congress that "[t]he improvement achieved by this innovation" would add

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of the 1990 Census, at 12 (Feb. 21, 1991).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Bureau of the Census, *1970 Census of Population and Housing: Effect of Special Procedures to Improve Coverage in the 1970 Census* 12 (1974).

<sup>18</sup> See GAO, *Programs to Reduce the Decennial Census Undercount* (GAO/GGD-76-72), at 12 (May 5, 1976).

"perhaps 1 million persons" to the census count.<sup>19</sup> The House Committee on Post Office and Civil Service discussed both this program and the Postal Service check favorably and recommended that additional funds be sought. See H.R. Rep. No. 91-1777, at 22, 41, 43 (1970).

D. The only novelty involved in the Commerce Department's Plan for Census 2000 lies in the sophistication, and hence the reliability, of the scientific methods the Secretary seeks to use. The Census Bureau is preparing to take every reasonable step to contact each occupied household in the nation and obtain a complete census. The Bureau will send census questionnaires by mail, and in some circumstances hand delivery, to every occupied housing unit known to it. See *Report to Congress* at 12. It will send follow-ups and reminders, fund a public outreach and advertising campaign, and even arrange for the placement of forms in public places. It will deploy census takers to homeless shelters, soup kitchens, nursing homes, college dormitories, migrant and seasonal farm worker camps, military barracks, American Indian reservations, and even remote areas in Alaska. *Id.* The question posed here is thus not whether a full census must be attempted, or whether a good faith effort to reach every person must be made, but only whether the Bureau will be permitted, as it has been in the past, to use the best available scientific methods to correct for inaccuracies and omissions in collected data and to ensure the most accurate census data possible.

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<sup>19</sup> *Accuracy of the 1970 Census Enumeration and Related Matters: Hearings Before the Subcomm. on Census and Statistics of the Comm. on Post Office and Civil Serv., House of Representatives, 91st Cong., 2d Sess. 6* (1970).

#### IV. The Secretary Has Discretion under the Statutes to Use Scientific Statistical Sampling for Purposes of Apportionment of the Representatives In Congress.

On its merits, this case involves the harmonization of two statutory provisions in the Census Act, one of which permits scientific statistical sampling and the other of which does not by its terms prohibit such sampling. Properly construed, these provisions leave the matter of sampling to the Secretary's discretion. Moreover, on its face, the House's claim that the Secretary is powerless to employ scientific techniques to correct known inaccuracies contravenes the principle that the Census Act "embodies a duty to conduct a census that is accurate and that fairly accounts for the critical representational rights that depend on the census and the apportionment." *Franklin v. Massachusetts*, 505 U.S. at 820 (Stevens, J., joined by Blackmun, Kennedy and Souter, JJ., concurring in part and in the judgment).

A. The Census Act includes two provisions authorizing the use of statistical methods, including "sampling." The first, 13 U.S.C. § 141(a), provides:

The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of the population as of the first day of April of such year . . . *in such form and content as he may determine, including the use of sampling procedures and special surveys.*

The italicized language (added in 1976) makes clear that the Secretary has the authority to use scientific statistical sampling techniques. It is also plain that the "decennial census" to which this subsection refers includes the census undertaken for purposes of apportionment of Representatives in Congress. See 13 U.S.C. § 141(b) (referring to "[t]he tabulation of total population by States *under subsection (a) of this section* as required for the apportionment of Representatives in Congress among the several States") (emphasis added); see also 2 U.S.C.



§ 2a(a) (requiring the President to "transmit to the Congress a statement showing the whole number of persons in each State, . . . as ascertained under the . . . decennial census of the population" for use in congressional apportionment) (emphasis added). Standing alone, then, § 141 would leave no doubt that Congress's delegation of authority to the Secretary to conduct the census includes authority for "the use of sampling procedures."

The second statute, 13 U.S.C. § 195, actually *mandates* the use of sampling, at least where the Secretary considers it feasible, but with a limitation relating to apportionment:

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

As originally enacted in 1957, § 195 authorized, rather than required, the use of sampling for non-apportionment purposes.<sup>20</sup> The "except for" clause of § 195 now creates an exception to a mandate, rather than an exception to an authorization. By its terms, therefore, § 195 now provides only that the Secretary is not *mandated* to use sampling in the enumeration for apportionment.

The district court of course read the "except for" clause to *prohibit* the use of sampling in apportionment. It is black letter law, however, that a statute must be construed if possible to give each word effect. E.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Under that principle, the amended § 195 must be read as *requiring* sampling (if feasible) for non-apportionment purposes and as *permitting* it in the Secretary's discretion for

<sup>20</sup> 13 U.S.C. § 195 originally provided that "[e]xcept for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." Pub. L. 85-207, 71 Stat. 484 (Aug. 28, 1957).

apportionment purposes. The alternative put forward by the House — that sampling is prohibited for purposes of congressional apportionment, but required if feasible for every other purpose — is not only unsupported by the plain language of § 195, but would also render the 1976 amendment to § 141(a) meaningless, since that section clearly refers to the census undertaken for the purpose of congressional apportionment.

The court below recognized this problem. It did *not* adopt the House's suggested reading, that the references to sampling and special surveys in § 141(a) apply only to the collection of demographic data undertaken in conjunction with the decennial census. See J.S. App. 60a. This would have required an impermissible rewriting of the plain language of § 141(a). Cf. *United States v. Monsanto*, 491 U.S. 600, 611 (1989).

Rather, the district court concluded that the "general grant" in § 141(a) "*permits* sampling techniques . . . in the conduct of the decennial census," J.S. App. 62a (emphasis added), but that § 195 "*proscribes* the same." J.S. App. 61a. This led it to conclude that the two provisions "conflict," *id.*, and that the question of the statute's meaning therefore turned on which provision was the "general" and which the "more specific." *Id.*

Because these two provisions were *adopted in the same Act*, however, a court should not *choose between them* without first attempting to fulfill its obligation is to *harmonize* them.<sup>21</sup> Both provisions *can* be given effect if the "except for/shall" construction is read to render the use of sampling for congressional apportionment *discretionary* while making sampling for all other purposes, at least where feasible, *mandatory*. The district court, however, did not even attempt to read the statute as a whole. See J.S. App. 54a (misconstruing § 195 after examining it in isolation, and concluding, *inter alia*,

<sup>21</sup> The entire question of which statute is "general" and which "specific" is, in any event, a red herring. Since, on the lower court's reading, one provision specifically "permits" sampling and the other specifically "proscribes" it, *neither* is more specific.

that the only indications of congressional intent in 1976 to permit sampling were the "subtle shifts in language" in § 195).

The district court's failure to consider the statute as a whole also contributed to the mistaken conclusion it drew from its consideration of the "wedding dress" example. The court began by erroneously assuming that it would have been shocking for Congress to have permitted the use of sampling for purposes of correcting inaccuracies and omissions in collected data; it analogized a sampling-free census to a "wedding dress" that is "extraordinarily fragile and of deep sentimental value." J.S. App. 53a. The history of the use of non-counting methods of enumeration, see *supra* at pp. 15-20, belies the district court's assumption.

The court below then brushed aside examples from the United States Codes where the "except for/shall" formulation is used to delegate discretion to a federal officer, see J.S. App. 51a-52a (citing 5 U.S.C. § 555(e); 16 U.S.C. § 230d; 16 U.S.C. §§ 459j-4, 460w-4),<sup>22</sup> and instead relied on a hypothetical example of its own: "except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners." J.S. App. 53a.

But even if a census without sampling were like a wedding dress in the closet, the court's example is incomplete because it ignores § 141(a). If the district court had read the statute as a whole its example would have read:

1. You shall have discretion to take care of my grandmother's wedding dress in whatever way you may determine, including the use of dry cleaning. (§ 141(a)).
2. Except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners. (§ 195).

These words, while not artful, would clearly permit one to have the dress cleaned.

<sup>22</sup> See also 2 U.S.C. § 384; 12 U.S.C. § 2076a; 14 U.S.C. § 203.

B. At most the House's reading of § 195 renders ambiguous the statutory language addressing whether the Secretary has discretion to utilize sampling to correct apportionment data. See *Concrete Pipe and Products v. Construction Laborers Trust*, 508 U.S. 602, 627 (1993) (incoherence of statutory language is a form of ambiguity). In such circumstances, a Court's obligation is to defer to the Secretary's reasonable interpretation of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-845 (1984).

The court below dismissed this obligation with the assertion that "the Secretary of Commerce has reversed his position on this issue" and "has not amply justified his change of interpretation with a 'reasoned analysis.'" J.S. App. at 46a-47a n. 11. These conclusions reflect a profound misunderstanding of the law.

*Chevron* itself upheld a new agency policy that departed from past practices: "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 467 U.S. 863-64. So long as agency's new views are not "[s]udden and unexplained," "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996).

*Rust v. Sullivan*, 500 U.S. 173, 187 (1991), makes clear that the requirement of "reasoned analysis" is satisfied by an agency's determination that a change in course is "more in keeping with the original intent of the statute" and "justified by" present needs and exigencies. *Id.* In this case, the Bureau's conclusion that the statute permits it to implement its plan for Census 2000 plainly meets that standard.

The Bureau has explained that "[c]ensus takers have never been able to contact and count each and every resident of this nation. As a result, information on less than the whole population has always been used to characterize the whole population." *Report to Congress* at 23. Further, "Census 2000



will not be the first time that the Census Bureau has used statistical methods to correct for problems in physical enumeration and to provide a more accurate final result." *Id.* The Bureau noted that it had used statistical imputation since at least 1940; that it had used sampling as part of the National Vacancy Check in 1970; that sampling enjoys overwhelming support in the scientific community; that sampling is needed to reduce the differential undercount; and that, "[b]ecause of changes in our society, a sample drawn by including only those physically contacted" would be "markedly inaccurate." *Id.* at 23-24. The Bureau also analyzed the Census Act and concluded that it authorized the use of sampling. *Id.* at 52-54.<sup>23</sup> The Bureau's

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<sup>23</sup> The Secretary's change in position is also far less sudden than the district court supposed. In 1980 the Census Bureau expressed the view that Section 195 "expressly prohibited the use of sampling in the apportionment process," 45 Fed. Reg. 69,366, 69,372 (1980). This view, however, was short-lived. Indeed, congressional questioning of Bureau officials *preceding* the 1980 census as to the technical feasibility of adjusting population counts reveals that neither Congress nor the Bureau viewed § 195 as a bar to adjustments for apportionment purposes and that the Bureau's hesitancy resulted from a lack of technical proficiency at the time, rather than a statutory prohibition. *E.g.*, 1980 Census: Hearing before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service, 94th Cong., 2d Sess. 20 (1976) (exchange between Vincent P. Barabba and Rep. Patricia Schroeder).

Throughout the 1980s the Bureau committed significant resources toward making statistical adjustment feasible for the 1990 census. See, *e.g.*, *Wisconsin v. New York*, 517 U.S. at 7. In numerous congressional briefings, Census officials discussed the sampling that would be performed if it were deemed feasible. There was no suggestion that it was beyond the Bureau's statutory authority. See 1990 Census Adjustment Procedures and Coverage Evaluation: Hearing before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service, 99th Cong., 2d Sess. 10 (1986); Census Bureau Planning for the 1990 Decennial Census: New York City Field Hearing before the Subcomm. on Energy, Nuclear Proliferation, and Government Processes of the Comm. on Governmental Affairs, 99th Cong., 2d Sess. 13-14 (1986). When, in 1990, the Secretary decided against the use of sampling, his decision was based on perceived weaknesses in the proposed PES approach, not on any view that it was statutorily prohibited. See *Wisconsin v. New York*, 517 U.S. at 10-11.

considered judgment to use sampling thus clearly warrants *Chevron* deference.<sup>24</sup>

## V. The Constitution Permits the Use of Scientific Statistical Sampling to Correct for Inaccuracies and Omissions in Collected Data.

Nothing in the text of the Constitution or the history of the census prohibits the use of statistical methods for the correction of inaccuracies or omissions in collected data. Adoption of the House's position would prevent not only sampling, but also many of the methods that have been used for the past fifty years to produce accurate census data. It would hobble the government in the preparation of the census and would render future censuses far less accurate than they have been in the past. No line can plausibly be found in the Constitution that distinguishes what the House seeks to forbid from what has routinely been done in the modern census.

A. The constitutional text does not prohibit the use of scientific statistical methods to correct for inaccuracies and omissions in the collected census data. In the eighteenth century, as today, the word "enumeration" meant "a determination of the number of." Samuel Johnson defined "enumeration" as "the act of numbering or counting over," Samuel Johnson, *A Dictionary of the English Language* (11th ed. 1797); Noah Webster defined it as "a numbering up or counting over." Noah Webster, *A Compendious Dictionary of the English Language* (1st ed. 1806).

The Constitution thus requires that a determination of the

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<sup>24</sup> *Chevron* principles are applicable even if they are not pressed by the Department of Commerce. A court must respect the Executive's institutional prerogatives regardless of whether the Department actively defends them. See *Zschemig v. Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., concurring); cf. *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990) (court must redress a violation of the separation of powers, even if a coordinate branch "has both the incentive to protect its prerogatives and the institutional mechanisms to help it do so").

populations of each State be made for purposes of apportioning the seats in Congress among them. Nothing in the text suggests that the Congress is required to undertake the kind of one-by-one count of only those individuals who can be located, without employing scientific statistical methods to correct for inaccuracies or omissions in the collected data, that the House suggests.

Indeed, to the extent that the constitutional text suggests anything about the matter, its terms point in the other direction. The purpose of the "enumeration" is to establish the "respective Numbers" within each state, a purpose that is hardly served by the limitation the House would have this Court impose. In addition, the text commits to Congress discretion to "ma[k]e" the "enumeration" "in such Manner as they shall by Law direct." This would hardly be the clearest way of stating that Congress is required to count each person who can be located singly, without making any provision for correcting the collected data to cure inaccuracies or omissions.

In requiring an "enumeration," the Framers' purpose was to replace the "conjectural ratio" of seats temporarily made in Art. I, § 2, cl. 3 with a "more permanent and precise standard." 1 Max Farrand, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 578 (Rev. ed. 1966). Their goal was an accurate count as opposed to the type of guess they had used in apportioning the First Congress. The word "actual," which precedes the word "enumeration," does not modify its content. Whatever means for determining the population are included within the concept of an "enumeration" are, by definition, included within the concept of an "actual" enumeration as well.

Moreover, the command of Article I, § 2 that a decennial census be taken is unusual because it is included only by implication. Most constitutional commands are explicit. See, e.g., Art. I, § 4, cl. 1 ("The Congress shall assemble . . ."). No constitutional provision states in so many words that "An actual enumeration shall be made. . . ." Rather, the requirement of a census is the implication of the first two sentences of Art. I, § 2,

cl. 3: The first renders an accounting of the population necessary for apportionment and the levying of taxes. The second explains the time and manner by which that accounting is to be made.

A close reading of the language of Article I makes clear that the reference to "[t]he *actual* enumeration" was not meant to describe the method by which the enumeration was to be accomplished, but simply to emphasize that the enumeration *itself* shall be made within three years.<sup>25</sup> This emphasis was necessary because of the textual transition from the preceding description of the formula by which the Numbers of each State are to be determined.<sup>26</sup>

B. Were the constitutional text not sufficient, the history of the census demonstrates that what the House seeks is a radical reinterpretation of what the Constitution requires. See *supra* at pp. 15-20. Until the third census Congress did not require even personal inquiry of each household in the nation. It did, however, provide for a mechanism for correction of the collected data. *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991) (opinion

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<sup>25</sup> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years in such Manner as they shall by Law direct. . . . and until such enumeration shall be made, the [States shall have the following specified numbers of Representatives].

U.S. Const. Art. I, § 2, cl.3.

<sup>26</sup> That formula of course was superseded by § 2 of the Fourteenth Amendment. U.S. Const. Amdt. XIV, § 2. The language relating to "direct taxes" was superseded by the Sixteenth Amendment, which permits Congress to tax income "without apportionment among the several States." U.S. Const. Amdt. XVI.



of Scalia, J.) ("The actions of the *First* Congress . . . are of course persuasive evidence of what the Constitution means.") (emphasis added). With the development of scientific statistical methods in this century, the methods used to arrive at final census data—whether termed "corrections," "adjustments," or "augmentations" to the collected data — have included scientific procedures that are indistinguishable in principle from those contained in the Secretary's Plan for Census 2000.

### CONCLUSION

The House asks this Court to impose a mandate for a kind of census that has never before been performed and that would render the determination of the "respective Numbers" in each State needlessly inaccurate. The ghost of censuses past which fills the House with nostalgia is a phantom. For the sake of the future, this Court should take care not to make it real.

The judgment of the district court should be vacated and remanded with instructions to dismiss the complaint, or, if this Court should reach the merits, the judgment should be reversed.

Respectfully submitted,

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## APPENDIX A

NET UNDERCOUNT AND OVERCOUNT  
BY CONGRESSIONAL DISTRICT

## Methodological Note

This Appendix outlines the net undercount or overcount for U.S. congressional districts in the 1990 census. The Appendix was created by matching the unadjusted 1990 population figures for each census block with the corresponding adjusted figures for each block, based on adjusted data released by the Bureau of the Census in July 1998.

This new information made it possible to compose a file for each state listing every census block in the state, the census block's congressional district assignment, and the block's adjusted and unadjusted 1990 population.

In districts where the adjusted population exceeded the unadjusted population, the difference is the net undercount. Because of double-counting and the inclusion of people who should not have been counted, the actual number of persons missed by the methods used in 1990 may have been greater than the net undercount.

In districts where the unadjusted population exceeded the adjusted population, the difference is the net overcount.



# ADJUSTED AND UNADJUSTED 1990 POPULATION

## Sorted by Net Undercount

8/25/98

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER	NET UNDERCOUNT NUMBER	% AFRICAN AMERICAN	% HISPANIC
NY16	620,583	580,336	0	40,245	33.6	60.2
NY11	616,460	580,337	0	36,123	70.4	11.0
NY15	616,042	580,337	0	35,705	37.1	46.9
CA35	606,486	570,882	0	35,604	41.3	43.0
CA37	603,250	572,049	0	31,201	33.1	45.1
NY12	610,898	580,337	0	30,561	8.9	58.6
NY10	610,809	580,338	0	30,471	57.4	19.9
CA32	602,769	572,595	0	30,174	39.1	30.4
CA33	599,621	570,943	0	28,678	3.8	84.1
CA20	601,284	573,282	0	27,982	6.1	56.3
CA30	599,388	572,538	0	26,850	3.1	62.0
NY17	606,427	580,337	0	26,090	38.5	29.7
TX29	594,592	568,959	0	25,633	14.9	46.2
AZ06	636,481	610,872	0	25,609	1.3	13.1
TX20	591,513	566,217	0	25,296	5.5	61.7
NJ10	619,865	594,630	0	25,235	59.8	12.4
TX16	591,240	566,217	0	25,023	3.3	71.1
CA09	598,254	573,458	0	24,796	32.2	12.1
FL21	586,277	562,519	0	23,758	3.3	70.3
FL17	585,834	562,519	0	23,315	56.0	23.4
TX18	590,160	567,364	0	22,796	44.0	24.3
FL18	585,240	562,519	0	22,721	2.9	67.5
TX15	588,797	566,217	0	22,580	1.0	75.2
TX30	586,823	564,431	0	22,392	44.0	19.0
CA50	595,683	573,463	0	22,220	14.3	41.0
AZ02	632,709	610,871	0	21,838	6.6	50.9
CA26	593,237	571,523	0	21,714	6.0	53.5
NM03	526,275	504,919	0	21,356	1.1	34.5
LA02	623,656	602,877	0	20,779	60.9	3.7
CA31	593,407	572,643	0	20,764	1.5	59.3
MD07	618,430	597,700	0	20,730	71.3	9
TX28	586,931	566,217	0	20,714	8.3	61.1
MD04	618,158	597,690	0	20,468	58.2	6.6
CA46	591,800	571,380	0	20,420	2.3	50.9
GA05	609,762	589,359	0	20,403	62.4	2.0
TX25	584,954	564,724	0	20,230	22.8	19.4
TX10	586,262	566,217	0	20,045	10.9	22.3

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# ADJUSTED AND UNADJUSTED 1990 POPULATION

## Sorted by Net Undercount

8/25/98

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER	NET UNDERCOUNT NUMBER	% AFRICAN AMERICAN	% HISPANIC
TX27	586,242	566,217	0	20,026	2.3	66.9
NJ13	614,154	594,630	0	19,524	11.9	42.6
CA08	592,750	573,247	0	19,503	12.9	15.9
MI01	818,348	799,065	0	19,283	3	1.6
CA17	590,103	570,981	0	19,122	4.1	32.4
VA03	581,288	562,351	0	18,937	64.6	1.5
TX24	586,271	567,454	0	18,817	20.2	21.8
IL07	590,163	571,530	0	18,633	65.9	4.3
FL23	580,895	562,519	0	18,376	50.8	9.7
CA18	589,760	571,393	0	18,367	2.7	26.6
MA08	619,586	601,643	0	17,953	22.8	11.0
NY06	598,065	580,337	0	17,728	54.1	17.2
CA42	589,344	571,844	0	17,500	11.3	34.8
CA38	590,143	572,657	0	17,486	8.0	26.2
CA34	590,200	573,047	0	17,153	1.8	63.1
CA16	586,428	571,551	0	16,877	5.1	37.6
CA11	586,595	571,772	0	16,823	5.6	21.7
CA22	589,656	572,891	0	16,765	2.4	21.8
SC06	597,686	581,117	0	16,569	62.6	6
WA04	557,279	540,744	0	16,535	9	16.6
GA04	605,773	589,322	0	16,451	37.0	3.3
TX23	582,668	566,217	0	16,451	2.8	63.0
IN09	556,412	541,981	0	16,431	59.8	7
CA05	589,853	573,684	0	16,169	13.2	15.0
CA19	589,185	573,043	0	16,142	3.3	24.3
AL07	593,350	577,227	0	16,123	67.9	3
TX07	580,890	564,900	0	15,990	6.0	17.3
MI15	596,872	580,956	0	15,916	70.2	4.2
FL03	578,263	562,519	0	15,744	47.1	3.6
NM02	520,246	504,659	0	15,587	2.0	42.5
CO01	564,649	549,068	0	15,581	13.2	22.3
IL04	586,926	571,530	0	15,396	5.6	65.4
CA44	586,546	571,583	0	14,963	5.0	28.6
PA02	580,582	565,650	0	14,932	62.8	1.6
CA03	586,241	571,374	0	14,867	3.2	14.7
TX12	580,967	566,217	0	14,750	8.0	16.9
NC12	566,408	551,722	0	14,686	56.9	9

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# ADJUSTED AND UNADJUSTED 1990 POPULATION Sorted by Net Undercount

97998

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER RANK	NET UNDERCOUNT NUMBER RANK	% AFRICAN AMERICAN	% HISPANIC
MS02	529,302	514,646	0 361	14,656 75	63.2	.5
PA01	580,780	566,155	0 360	14,625 76	52.6	10.0
CA27	587,185	572,594	0 359	14,591 77	8.3	21.1
TX05	581,999	567,457	0 358	14,542 78	15.7	15.1
IL01	580,004	571,530	0 357	14,474 79	69.9	3.5
CA01	587,539	573,082	0 356	14,457 80	3.7	11.6
NV02	615,333	600,876	0 355	14,457 81	2.6	8.8
CA21	585,754	571,300	0 354	14,454 82	4.1	20.8
NV01	615,376	600,957	0 353	14,419 83	10.9	12.5
CA49	587,742	573,362	0 352	14,380 84	5.3	13.0
LA06	617,106	602,774	0 351	14,332 85	32.2	1.4
FL11	576,691	562,519	0 350	14,172 86	17.1	14.3
CA07	586,942	572,773	0 349	14,169 87	17.1	13.5
NC01	566,831	552,752	0 348	14,079 88	57.6	.8
CA23	585,550	571,483	0 347	14,067 89	2.5	30.8
TX14	580,255	566,217	0 346	14,038 90	10.4	24.3
UT03	588,259	574,250	0 345	14,009 91	.4	5.3
GA02	601,516	587,563	0 344	13,933 92	39.4	1.8
LA04	616,704	602,802	0 343	13,902 93	32.9	1.8
CO03	562,686	549,062	0 342	13,624 94	.6	17.8
TX22	581,767	568,160	0 341	13,607 95	12.6	17.5
MI14	594,541	580,958	0 340	13,585 96	69.4	1.0
CA29	585,150	571,566	0 339	13,584 97	3.5	13.5
CO04	562,645	549,070	0 338	13,575 98	.7	15.2
CA41	586,124	572,663	0 337	13,461 99	6.7	32.2
VA02	575,732	562,276	0 336	13,456 100	16.7	3.4
TX03	581,064	567,648	0 335	13,416 101	7.5	8.7
CA40	587,025	573,625	0 334	13,400 102	5.4	16.4
GA10	601,445	588,046	0 333	13,399 103	38.0	1.1
CA02	586,630	573,322	0 332	13,308 104	1.5	6.2
CA43	584,383	571,231	0 331	13,152 105	5.9	25.6
TX13	579,296	566,217	0 330	13,079 106	7.9	20.0
TX26	577,836	564,843	0 329	12,993 107	5.4	10.0
VA08	575,390	562,464	0 328	12,906 108	13.4	9.2
CA52	586,053	573,203	0 327	12,850 109	3.1	23.2
TX11	579,043	566,217	0 326	12,826 110	15.7	12.7
TX19	579,010	566,217	0 325	12,793 111	2.5	20.1

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# ADJUSTED AND UNADJUSTED 1990 POPULATION Sorted by Net Undercount

97998

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER RANK	NET UNDERCOUNT NUMBER RANK	% AFRICAN AMERICAN	% HISPANIC
OR02	581,233	568,464	0 324	12,769 112	.3	5.6
SC01	593,736	581,127	0 323	12,609 113	20.4	1.4
GA01	601,099	588,541	0 322	12,556 114	30.7	1.8
WI05	656,077	643,530	0 321	12,547 115	35.8	2.7
CA14	583,559	571,131	0 320	12,428 116	5.0	13.9
AZ01	623,294	610,872	0 319	12,422 117	3.3	13.5
NC04	564,797	552,387	0 318	12,410 118	20.4	1.4
TX08	577,493	565,090	0 317	12,403 119	5.1	7.4
WA07	553,133	540,747	0 316	12,388 120	10.4	3.6
OH11	583,170	570,901	0 315	12,269 121	59.0	1.1
IL02	583,754	571,530	0 314	12,224 122	68.6	6.6
DE01	676,385	666,168	0 313	12,217 123	17.0	2.5
ID02	515,422	503,362	0 312	12,060 124	.4	6.2
MS04	525,604	513,619	0 311	11,985 125	41.4	.4
FL08	574,491	562,518	0 310	11,973 126	5.0	11.8
OR04	580,374	568,465	0 309	11,909 127	.5	2.4
SC02	592,986	581,099	0 308	11,887 128	25.4	1.5
AL01	589,097	577,226	0 307	11,871 129	28.9	.8
CA13	584,298	572,441	0 306	11,857 130	7.6	18.8
GA08	599,705	587,912	0 305	11,793 131	31.3	1.0
VA11	574,290	562,497	0 304	11,793 132	8.2	7.8
TX05	553,694	541,910	0 303	11,784 133	23.2	.9
CA48	584,685	572,928	0 302	11,757 134	4.1	17.8
LA05	614,660	602,933	0 301	11,727 135	31.3	.9
GA03	601,335	589,630	0 300	11,705 136	24.9	1.8
VA04	574,101	562,466	0 299	11,635 137	32.4	1.2
NR01	517,058	505,491	0 298	11,567 138	2.5	38.7
CA36	585,215	573,663	0 297	11,552 139	3.3	15.3
MD05	609,233	597,681	0 296	11,552 140	18.7	2.5
SC05	592,665	581,131	0 295	11,534 141	31.2	.8
TX09	575,738	564,322	0 294	11,416 142	21.7	9.6
LA03	614,223	602,839	0 293	11,384 143	23.8	2.3
AR02	598,792	587,412	0 292	11,380 144	18.0	.8
LA07	614,277	602,906	0 291	11,371 145	24.0	1.2
OR05	579,824	568,466	0 290	11,358 146	.6	5.2
TX21	577,568	566,217	0 289	11,351 147	2.4	14.6
KY06	626,250	614,901	0 288	11,349 148	8.1	.7

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# ADJUSTED AND UNADJUSTED 1990 POPULATION Sorted by Net Undercount

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER	NET OVERCOUNT RANK	NET UNDERCOUNT NUMBER	NET UNDERCOUNT RANK	%AFRICAN AMERICAN	%HISPANIC
NY07	591,650	580,337	0	287	11,323	149	9.3	22.1
AR01	599,907	588,588	0	286	11,319	150	18.1	7
MS03	526,465	515,206	0	285	11,259	151	31.7	6
AK01	581,276	550,043	0	284	11,233	152	4.0	3.3
AZ05	622,043	610,871	0	283	11,172	153	3.0	16.9
MD03	608,820	597,666	0	282	11,154	154	17.6	1.8
MO01	579,420	568,285	0	281	11,135	155	52.9	9
NC03	583,516	552,387	0	280	11,129	156	21.6	1.7
KY03	624,924	613,805	0	279	11,119	157	18.7	7
HI02	595,198	554,110	0	278	11,088	158	2.4	9.4
TX17	577,285	566,217	0	277	11,068	159	3.5	17.6
TX08	576,518	565,469	0	276	11,049	160	5.1	6.0
CA45	581,918	570,874	0	275	11,044	161	1.3	15.3
CA06	582,176	571,227	0	274	10,949	162	2.3	9.3
WA08	551,668	540,742	0	273	10,926	163	5.5	3.2
GA11	600,310	589,398	0	272	10,912	164	11.9	1.3
FL02	573,352	562,518	0	271	10,834	165	24.2	2.0
VA01	573,576	562,757	0	270	10,819	166	17.8	1.6
CA28	583,743	572,927	0	269	10,816	167	5.8	24.6
VA05	573,068	562,268	0	268	10,800	168	25.0	6
GA07	600,203	589,405	0	267	10,798	169	13.4	1.2
OK06	535,012	524,264	0	266	10,748	170	13.3	4.6
CA39	584,274	573,574	0	265	10,700	171	2.7	23.4
NC02	562,715	552,020	0	264	10,695	172	22.1	1.3
NC07	563,057	552,386	0	263	10,671	173	18.7	3.0
AZ03	621,538	610,871	0	262	10,667	174	2.0	12.2
LA01	613,459	602,842	0	261	10,617	175	12.3	4.5
TX01	576,816	566,217	0	260	10,599	176	18.2	3.4
GA08	600,152	589,600	0	259	10,552	177	6.5	2.2
MD01	608,202	597,678	0	258	10,524	178	15.2	1.2
FL01	572,993	562,518	0	257	10,475	179	13.0	2.1
ID01	513,861	503,387	0	256	10,474	180	2	4.8
KY05	635,284	624,837	0	255	10,447	181	1.0	3
SC03	591,563	581,116	0	254	10,447	182	21.4	6
WA02	551,008	540,739	0	253	10,269	183	9	3.1
AR04	595,428	585,202	0	252	10,228	184	26.9	9
FL12	572,692	562,519	0	251	10,173	185	12.6	6.5

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# ADJUSTED AND UNADJUSTED 1990 POPULATION Sorted by Net Undercount

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER	NET OVERCOUNT RANK	NET UNDERCOUNT NUMBER	NET UNDERCOUNT RANK	%AFRICAN AMERICAN	%HISPANIC
OK04	534,421	524,265	0	250	10,156	186	7.2	4.1
NY08	590,478	580,337	0	249	10,141	187	7.7	13.3
AL03	587,385	577,227	0	248	10,138	188	26.2	6
WA09	550,878	540,744	0	247	10,134	189	5.7	3.8
AL02	587,360	577,227	0	246	10,133	190	24.4	9
NC08	562,516	552,387	0	245	10,128	191	23.4	1.5
TX02	576,305	566,217	0	244	10,088	192	16.7	5.8
WY01	463,629	453,588	0	243	10,041	193	8	5.8
TX04	578,235	568,217	0	242	10,018	194	8.4	4.5
OK01	534,226	524,264	0	241	9,982	195	9.7	2.5
GA09	599,341	589,420	0	240	9,921	196	3.7	1.8
IN10	564,326	554,418	0	239	9,908	197	30.3	1.2
HI01	563,972	554,119	0	238	9,853	198	2.6	5.7
WA05	550,562	540,744	0	237	9,818	199	1.2	3.5
SC04	590,911	581,113	0	236	9,798	200	19.9	8
IN08	551,683	541,907	0	235	9,776	201	19.9	7
IL09	581,268	571,530	0	234	9,738	202	12.1	10.0
KY02	624,290	614,592	0	233	9,698	203	5.5	9
VA10	572,283	562,664	0	232	9,619	204	5.8	2.3
MD08	607,237	597,682	0	231	9,555	205	8.2	6.6
OK05	533,799	524,264	0	230	9,535	206	5.7	3.4
MS01	524,539	515,039	0	229	9,500	207	23.0	5
CO05	558,565	549,086	0	228	9,499	208	5.8	7.6
CA26	582,600	573,105	0	227	9,495	209	4.3	16.8
UT01	583,777	574,286	0	226	9,491	210	1.0	4.8
OH01	580,305	570,906	0	225	9,405	211	30.7	6
CO02	558,462	549,072	0	224	9,390	212	8	9.7
OR03	577,799	568,465	0	223	9,334	213	6.2	3.3
WA03	550,061	540,745	0	222	9,316	214	9	2.6
NC05	580,777	552,386	0	221	9,297	215	15.3	8
CA12	571,535	571,535	0	220	9,242	216	4.2	14.7
WY03	606,688	597,500	0	219	9,188	217	4.5	5
CA15	581,666	572,485	0	218	9,181	218	2.3	11.1
KY04	611,989	602,896	0	217	9,093	219	2.2	5
FL20	571,584	562,518	0	216	9,066	220	4.2	12.8
NC09	561,955	552,902	0	215	9,053	221	9.2	1.1
KY01	623,307	614,265	0	214	9,042	222	7.9	8

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# ADJUSTED AND UNADJUSTED 1990 POPULATION Sorted by Net Undercount

8/2/98

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER	RANK	NET UNDERCOUNT NUMBER	RANK	% AFRICAN AMERICAN	% HISPANIC
FL04	571,478	562,519	0	213	8,959	223	6.5	2.8
AR03	598,469	589,523	0	212	8,946	224	1.6	1.2
TN07	550,880	541,937	0	211	8,943	225	12.5	1.2
CA04	579,968	571,033	0	210	8,935	226	1.7	7.7
MS05	523,638	514,706	0	209	8,932	227	20.2	1.1
VA09	571,235	562,380	0	208	8,855	228	2.5	.5
AL05	586,079	577,227	0	207	8,852	229	15.0	.8
VA07	571,490	562,643	0	206	8,847	230	10.2	1.1
VA08	571,383	562,572	0	205	8,811	231	11.6	.7
OR01	577,242	568,461	0	204	8,781	232	.8	4.2
FL06	571,253	562,518	0	203	8,735	233	11.0	3.0
AL08	585,954	577,226	0	202	8,728	234	8.4	.6
MD08	608,312	597,688	0	201	8,624	235	4.5	1.0
TN03	550,443	541,866	0	200	8,577	236	11.8	.6
FL07	571,090	562,518	0	199	8,572	237	3.9	5.7
OK03	532,797	524,264	0	198	8,533	238	4.1	1.5
TN02	550,372	541,864	0	197	8,508	239	6.8	.6
WV02	608,421	597,921	0	196	8,500	240	3.4	.5
CA51	581,474	572,982	0	195	8,492	241	1.8	14.1
CA24	581,019	572,563	0	194	8,456	242	2.1	14.0
OK02	532,708	524,264	0	193	8,444	243	5.1	1.2
NC11	560,776	552,387	0	192	8,389	244	7.3	.7
CA47	579,900	571,518	0	191	8,382	245	1.9	13.5
MD02	606,060	597,683	0	190	8,377	246	6.0	1.3
FL15	570,763	562,519	0	189	8,264	247	7.6	3.6
TN06	550,237	541,977	0	188	8,260	248	5.8	.8
OH12	579,114	570,902	0	187	8,212	249	23.7	.9
WV01	608,254	598,056	0	186	8,198	250	1.6	.5
FL16	570,599	562,519	0	185	8,080	251	4.0	6.6
FL14	570,434	562,518	0	184	7,916	252	5.4	6.9
NC08	560,445	552,535	0	183	7,910	253	7.8	.7
FL05	570,427	562,518	0	182	7,909	254	8.5	2.8
AZ04	618,601	610,871	0	181	7,730	255	2.0	8.0
TN04	549,579	541,868	0	180	7,711	256	3.7	.5
CO06	556,630	549,056	0	179	7,574	257	3.7	6.6
NC10	559,869	552,386	0	178	7,483	258	5.5	.8
NY26	587,769	580,338	0	177	7,431	259	5.5	4.5

# ADJUSTED AND UNADJUSTED 1990 POPULATION Sorted by Net Undercount

8/2/98

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER	RANK	NET UNDERCOUNT NUMBER	RANK	% AFRICAN AMERICAN	% HISPANIC
AL01	584,605	577,227	0	176	7,378	260	6.7	.4
NY14	587,645	580,337	0	175	7,308	261	4.1	11.5
MA05	576,250	569,130	0	174	7,120	262	24.1	3.1
TN01	546,961	541,875	0	173	7,098	263	1.9	.4
SD01	702,864	696,004	0	172	6,860	264	.5	.8
UT02	581,152	574,314	0	171	6,838	265	.6	5.1
MA05	553,659	546,867	0	170	6,772	266	9.7	1.8
FL09	569,115	562,518	0	169	6,597	267	3.5	4.2
NY24	566,855	560,338	0	168	6,517	268	2.4	1.7
OH03	577,352	570,901	0	167	6,451	269	18.2	.8
VT01	569,100	562,758	0	166	6,342	270	.3	.7
FL13	568,830	562,518	0	165	6,312	271	5.5	4.6
CA10	578,266	572,008	0	164	6,258	272	2.4	9.0
WA01	546,939	540,745	0	163	6,194	273	1.4	2.4
FL19	568,684	562,519	0	162	6,165	274	2.6	6.5
OH15	577,045	570,902	0	161	6,143	275	5.0	1.0
WA08	546,792	540,742	0	160	6,050	276	1.7	2.4
IL05	577,494	571,530	0	159	5,964	277	1.4	13.5
FL10	568,446	562,518	0	158	5,928	278	9.6	2.4
FL22	568,304	562,519	0	157	5,785	279	2.7	13.5
MI09	588,715	580,958	0	156	5,757	280	18.1	2.8
IL12	577,038	571,517	0	155	5,521	281	17.4	1.3
OH09	570,277	570,901	0	154	5,370	282	17.4	3.4
NY31	585,657	580,337	0	153	5,320	283	2.2	1.5
NJ02	599,941	594,630	0	152	5,311	284	13.9	6.9
NJ08	599,903	594,629	0	151	5,274	285	12.2	18.6
KS03	624,686	619,439	0	150	5,247	286	9.1	3.3
CT02	553,269	548,030	0	149	5,239	287	3.7	3.1
MA01	608,878	601,643	0	148	5,233	288	1.6	5.1
CT04	552,984	547,765	0	147	5,219	289	13.0	11.6
NE02	531,712	526,567	0	146	5,145	290	9.9	2.8
MI13	586,100	580,956	0	145	5,144	291	11.2	1.8
IN01	559,436	554,416	0	144	5,020	292	21.3	8.5
PA05	570,773	565,813	0	143	4,960	293	.9	.6
OH14	575,772	570,900	0	142	4,872	294	11.2	.6
NY23	585,198	580,337	0	141	4,861	295	2.7	1.6
MA04	551,699	546,867	0	140	4,812	296	4.3	2.9



ADJUSTED AND UNADJUSTED 1990 POPULATION  
Sorted by Net Undercount

9/25/98

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER	NET OVERCOUNT RANK	NET UNDERCOUNT NUMBER	NET UNDERCOUNT RANK	% AFRICAN AMERICAN	% HISPANIC
NI01	559,065	554,257	0	139	4,808	297	.7	1.1
KS04	624,126	619,374	0	138	4,752	298	6.7	3.8
ME02	618,695	613,967	0	137	4,728	299	.4	.5
NI02	559,567	554,995	0	136	4,572	300	.5	1.1
C101	552,569	548,027	0	135	4,542	301	14.1	10.0
ME01	618,435	613,961	0	134	4,474	302	.4	.6
IL15	575,885	571,530	0	133	4,355	303	7.6	1.7
ND01	643,033	638,800	0	132	4,233	304	.6	.8
PA16	570,168	565,947	0	131	4,219	305	5.2	4.1
MI08	585,163	580,954	0	130	4,209	306	6.0	3.0
IL14	575,672	571,530	0	129	4,142	307	4.1	10.1
KS02	623,465	619,391	0	128	4,074	308	6.3	3.1
WI04	547,592	543,527	0	127	4,065	309	.8	8.5
NY22	584,376	580,337	0	126	4,041	310	2.0	1.6
PA12	569,733	565,794	0	125	3,939	311	1.3	.4
PA09	569,638	565,803	0	124	3,835	312	1.2	.5
MI03	584,783	580,958	0	123	3,807	313	7.6	2.8
MA05	605,371	601,643	0	122	3,726	314	1.7	8.6
PA21	569,360	565,802	0	121	3,558	315	3.9	.8
MI05	584,496	580,958	0	120	3,540	316	9.7	1.9
IA01	558,644	555,229	0	119	3,415	317	2.7	2.1
KS01	622,737	619,370	0	118	3,367	318	1.3	5.4
IL10	574,888	571,530	0	117	3,356	319	6.2	7.2
WI02	548,874	543,532	0	116	3,342	320	2.1	1.3
OH10	574,236	570,903	0	115	3,333	321	2.1	4.1
PA19	568,810	565,779	0	114	3,040	322	2.6	1.4
PA08	568,882	565,874	0	113	3,014	323	2.3	3.5
IA04	558,279	555,278	0	112	3,003	324	2.8	1.5
WI01	546,432	543,530	0	111	2,902	325	5.5	3.6
PA17	568,527	565,682	0	110	2,845	326	6.9	2.0
IL08	574,343	571,530	0	109	2,813	327	1.7	5.6
NE01	529,100	526,297	0	108	2,803	328	1.1	1.4
IL11	574,193	571,543	0	107	2,650	329	8.7	6.5
OH17	573,539	570,900	0	106	2,639	330	10.0	1.4
C106	550,355	547,765	0	105	2,590	331	2.2	3.7
MI03	549,427	546,888	0	104	2,539	332	1.8	.9
IL17	574,037	571,530	0	103	2,507	333	3.3	3.1

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ADJUSTED AND UNADJUSTED 1990 POPULATION  
Sorted by Net Undercount

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER	NET OVERCOUNT RANK	NET UNDERCOUNT NUMBER	NET UNDERCOUNT RANK	% AFRICAN AMERICAN	% HISPANIC
MA04	604,082	601,642	0	102	2,440	334	2.1	2.6
MI05	583,383	580,958	0	101	2,407	335	8.5	3.5
NE03	527,900	525,521	0	100	2,379	336	.2	3.0
IL16	573,877	571,530	0	99	2,347	337	4.8	3.2
IN03	556,730	554,416	0	98	2,314	338	7.5	2.0
NY30	582,641	580,337	0	97	2,304	339	17.5	1.6
NY26	582,630	580,337	0	96	2,293	340	14.5	4.4
MO03	570,592	568,328	0	95	2,266	341	2.5	1.2
MO02	570,519	568,306	0	94	2,213	342	3.8	1.0
IL06	573,736	571,530	0	93	2,208	343	1.5	5.3
MO08	571,331	569,131	0	92	2,200	344	2.1	1.5
OH07	573,087	570,902	0	91	2,185	345	5.4	.7
NY18	582,489	580,337	0	90	2,152	346	7.4	10.9
IN07	556,495	554,416	0	89	2,079	347	2.0	.9
IL18	573,808	571,530	0	88	2,078	348	5.3	1.0
MA09	570,416	568,347	0	87	2,069	349	3.8	.8
WI08	545,442	543,378	0	86	2,064	350	.3	.7
MA02	603,655	601,642	0	85	2,013	351	5.7	6.3
MI07	582,917	580,957	0	84	1,960	352	5.7	2.5
OH02	572,858	570,902	0	83	1,958	353	2.3	.5
IA03	557,219	555,299	0	82	1,920	354	1.0	.8
WI03	545,453	543,533	0	81	1,920	355	.2	.5
C103	549,681	547,765	0	80	1,916	356	12.3	5.2
IL13	573,424	571,531	0	79	1,893	357	3.2	3.0
NY19	582,228	580,337	0	78	1,891	358	7.1	5.4
NY27	582,213	580,337	0	77	1,876	359	2.5	1.3
OH08	572,772	570,901	0	76	1,871	360	2.8	.5
OH16	572,727	570,902	0	75	1,825	361	4.9	.7
MI02	582,772	580,958	0	74	1,816	362	4.4	3.2
IA02	557,259	555,494	0	73	1,765	363	1.8	.7
MI07	548,634	546,887	0	72	1,747	364	.2	.8
MO08	570,125	568,385	0	71	1,740	365	4.5	.5
OH13	572,828	570,894	0	70	1,734	366	4.6	3.0
C105	549,485	547,764	0	69	1,721	367	4.7	6.5
NY25	582,049	580,337	0	68	1,712	368	6.9	1.4
IN06	556,093	554,414	0	67	1,679	369	1.1	.8
IN08	556,073	554,416	0	66	1,657	370	3.1	.6

# ADJUSTED AND UNADJUSTED 1990 POPULATION Sorted by Net Undercount

9/25/98

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER	NET UNDERCOUNT NUMBER	% AFRICAN AMERICAN	% HISPANIC
PA14	567,436	565,787	0	1,649	18.7	.8
MI12	582,601	580,956	0	1,645	3.8	1.2
IN02	554,415	554,415	0	1,622	4.2	.6
MI16	582,569	580,956	0	1,613	1.4	2.4
MO04	570,758	569,146	0	1,612	3.2	1.1
OH06	572,511	570,901	0	1,610	2.1	.4
IN04	556,014	554,416	0	1,598	5.6	1.6
NJ09	596,204	594,630	0	1,574	6.3	12.0
MO07	569,563	568,017	0	1,546	.9	.8
OH04	572,412	570,901	0	1,511	4.7	1.0
OH05	572,378	570,901	0	1,477	2.1	3.2
IA05	556,931	555,457	0	1,474	.6	1.0
IL20	572,949	571,530	0	1,419	4.3	.7
NJ08	596,037	594,630	0	1,407	11.4	6.4
MN06	548,257	546,887	0	1,370	.9	1.1
NY21	581,706	580,337	0	1,369	6.5	2.2
IN05	555,710	554,415	0	1,295	2.2	1.4
MI04	582,224	580,956	0	1,268	1.1	1.8
WI07	544,794	543,529	0	1,265	.2	.5
MI10	582,202	580,956	0	1,246	2.1	1.3
MN01	548,100	546,887	0	1,213	.3	1.0
NY20	581,538	580,338	0	1,198	7.9	6.3
IL19	572,689	571,530	0	1,159	4.0	.5
PA10	567,193	566,073	0	1,120	1.1	.8
OH19	571,978	570,901	0	1,077	1.8	.9
MI11	582,029	580,956	0	1,073	4.2	1.3
WI09	544,571	543,532	0	1,039	.4	1.1
MI01	581,981	580,956	0	1,025	.8	.6
WI06	544,836	543,878	0	958	.4	.9
MA03	602,525	601,842	0	883	1.8	4.0
IL03	572,373	571,531	0	842	2.0	7.3
OH18	571,630	570,900	0	730	2.4	.4
IN09	555,142	554,416	0	726	1.8	.5
RI02	502,506	501,787	0	719	4.0	5.6
NY09	581,008	580,338	0	670	3.1	8.9
NJ01	595,294	594,630	0	664	15.9	6.5
RI01	502,309	501,677	0	632	3.2	4.0

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# ADJUSTED AND UNADJUSTED 1990 POPULATION Sorted by Net Undercount

9/25/98

DISTRICT	ADJUSTED POPULATION	UNADJUSTED POPULATION	NET OVERCOUNT NUMBER	NET UNDERCOUNT NUMBER	% AFRICAN AMERICAN	% HISPANIC
MN02	547,504	546,888	0	616	.1	1.0
MA09	602,154	601,641	0	511	6.5	4.9
MN08	547,330	546,888	0	442	.4	.5
MA10	602,074	601,642	0	432	2.0	1.5
NY13	580,612	580,337	0	275	5.5	7.8
NJ04	594,891	594,630	0	261	12.7	5.5
NY29	580,076	580,337	261	0	4.6	2.9
PA20	565,419	565,815	396	0	3.3	.5
PA11	565,068	565,521	453	0	.9	.8
NJ12	593,833	594,630	797	0	5.3	2.8
PA15	564,618	565,810	1,192	0	2.1	5.0
NY04	578,854	580,338	1,484	0	16.2	7.9
MA06	599,631	601,619	1,988	0	1.6	3.1
NY05	578,144	580,337	2,193	0	3.4	7.7
PA04	563,409	565,792	2,383	0	3.3	.5
MA07	599,280	601,668	2,406	0	2.3	3.2
NJ07	592,068	594,629	2,561	0	10.4	5.2
NY02	577,405	580,337	2,932	0	9.5	10.1
NY01	577,087	580,338	3,251	0	4.1	4.9
NJ03	591,345	594,630	3,285	0	8.1	2.7
PA08	582,330	565,787	3,457	0	2.9	1.7
NJ11	590,569	594,630	4,061	0	2.7	4.3
NJ05	590,357	594,630	4,273	0	1.3	2.9
PA13	561,326	565,679	4,353	0	6.3	1.3
PA03	560,946	565,553	4,607	0	4.9	4.9
PA18	561,158	565,781	4,623	0	8.2	.6
PA07	560,614	565,746	5,132	0	4.0	1.0
NY03	572,889	580,337	7,448	0	2.0	4.6

A13



Supreme Court, U. S.  
**F I L E D**

**OCT 8 1998**

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No. 98-404

In The  
**Supreme Court of the United States**

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

*Appellants,*

vs.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

*Appellees.*

*On Appeal from the United States District Court  
for the District of Columbia*

**BRIEF OF AMICUS CURIAE COUNTY OF  
WESTCHESTER IN SUPPORT OF APPELLANTS**

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## **INTEREST OF AMICUS CURIAE**

This brief is submitted by the Westchester County Attorney on behalf of Westchester County, located in the State of New York, pursuant to Rule 37(4) of the Rules of the Supreme Court of the United States.

As a local municipality in the State of New York, Westchester County is required by law to utilize the federal decennial census for the purposes of establishing its legislative districts. By prohibiting the Census Bureau of the United States Department of Commerce (Bureau) from utilizing statistical sampling to obtain the most accurate enumeration possible for the 2000 decennial census, Westchester County will be compelled to inappropriately redistrict its legislative branch of government to the detriment of renters, children, racial and ethnic minorities as well as the entire Westchester County population as a whole. In light of this significant impact, Westchester County believes it to be vital that it express its views to this Honorable Court.



## SUMMARY OF THE ARGUMENT

Westchester County respectfully submits that the decision of the United States District Court (Lamberth, J) improperly interpreted 13 U.S.C. sections 141 and 195 by prohibiting the use of statistical sampling for a census for the purpose of congressional apportionment, while acknowledging the use of statistical sampling for the purpose of federal funding.

The primary purpose of the census is to provide accurate information upon which to base legislative districting. The census' central objective is to achieve the most accurate enumeration possible in this technological era. By prohibiting the Bureau from utilizing statistical sampling as part of its plan for the 2000 decennial census, the Court has denied the Bureau the use of an important technological tool and compelled Westchester County to inappropriately redistrict its legislative branch of government to the detriment of renters, children, racial and ethnic minorities as well as the entire Westchester County population as a whole. This will defeat the very purpose for which the census provisions of the Constitution were enacted.

Consequently, the decision of the United States District Court should be reversed in its entirety.

## ARGUMENT

The District Court's determination to prohibit the use of statistical sampling in the federal census for the year 2000 has effectively destroyed the equality of votes, especially when utilized by the local legislative branches of government such as Westchester County.

The United States census has undercounted Americans for over 200 years. However, a modern phenomenon, known as differential undercounting has only recently emerged. Differential undercounting is the term used to describe the difference in **the undercount** of one subgroup of the population, (*i.e.*, African-Americans) compared to another subgroup, (*i.e.*, non-African-Americans). The last several decennial censuses have undercounted certain groups - including renters, children and racial and ethnic minorities - at much higher rates than other segments of the population. Specifically, the Census Bureau indicated that approximately 4.4% of African-Americans, 5.0% of Hispanics, and 12.2% of American Indians living on reservations were not accounted for in the 1990 census, but only 0.7% of Non-Hispanic Whites were left unaccounted.

This differential undercount in the United States decennial census poses serious ramifications for local governments including, but not limited to, the composition of such local governments. For example, Westchester County, New York, has a population of approximately 900,000

individuals contained in an area of approximately 360 square miles, and divided into urban, suburban and rural areas. In addition, the towns, villages and cities<sup>1</sup> located within Westchester County vary in population make-up. In essence, Westchester County can be considered to be a microcosm of the entire United States of America.

The legislative branch of County government is divided into seventeen (17) legislative districts and is required, by law, to amend its districts in accordance with the United States decennial census. The long-standing inaccuracies from the federal census have a significant impact on the adequacy of representation received at the local levels.

In the past, Westchester County, and other similarly situated local governments within the State of New York, in recognition of the known inaccuracies in the United States decennial census, have attempted to supplement the federal census with information acquired locally. *See generally, Honig v. Rensselaer County Legislature*, 37 A.D.2d 658, 322 N.Y.S.2d 332 (3d Dep't 1971) *aff'd* 29 N.Y.2d 630, 324 N.Y.S.2d 417, 273 N.E.2d 143 (1971); *Seaman v. Fedourich*, 16 N.Y.2d 94, 262 N.Y.S.2d 444, 209 N.E.2d 778 (1965);

<sup>1</sup> The following cities, towns, and villages are all located within the County of Westchester: Peekskill, Rye, Mount Vernon, White Plains, Yonkers, Mount Kisco, New Rochelle, Bedford, Eastchester, Mamoroneck, New Castle, North Salem, Pelham, Pound Ridge, Yorktown, Cortlandt, Harrison, Scarsdale, Briarcliff Manor, Bronxville, Buchanan, Dobbs Ferry, Hastings-on-Hudson, Irvington, Larchmont, Port Chester, Tarrytown, and Tuckahoe.

*Chonigman v. County of Westchester*, 192 A.D.2d 499, 595 N.Y.S.2d 810 (2d Dep't 1993); *Town of Scarsdale v. County of Westchester*, 192 A.D.2d 517, 595 N.Y.S.2d 811 (2d Dep't 1993); *Thayer v. Garraghan*, 28 A.D.2d 584, 279 N.Y.S.2d 441 (3d Dep't 1967). The goal of supplementing the federal census was to achieve a more accurate count of the total population and its composition within each individual County so as to assure adequate representation of all individuals who reside within the County.

Notwithstanding the attempts of Westchester County to rectify the inaccuracies that the federal census imposed at the local levels, the New York courts, including New York State Court of Appeals, determined that counties, and other governmental entities, are bound to utilize the findings of the federal census, and may not devise their "own method of calculating population as a basis for deriving a districting plan for its elective lawmaking body". *Seaman v. Fedourich*, 16 N.Y.2d 94, 262 N.Y.S.2d 444, 209 N.E.2d 778 (1965); *Chonigman v. County of Westchester*, 192 A.D.2d 499, 595 N.Y.S.2d 810 (2d Dep't 1993); *Town of Scarsdale v. County of Westchester*, 192 A.D.2d 517, 595 N.Y.S.2d 811 (2d Dep't 1993). The New York State Court of Appeals in *Seaman v. Fedourich* specifically interpreted the New York State Constitution as mandating the utilization of the "latest Federal census [with respect to] ... the number of inhabitants in the state or any part thereof for the purposes of ... legislative



apportionment". *Seaman v. Fedourich*, 16 N.Y.2d at 104, 262 N.Y.S.2d at 451; *see also* N.Y. Const. Art. III, section 4. The fact that the method of calculating the population developed by the local municipalities more accurately reflected the composition of its populace was irrelevant since it was more important to rely upon the federal decennial census to "assure periodic, impartial population data on the basis of which an apportionment or districting plan may be initially developed and thereafter regularly revised." *Seaman* at 452.

In light of the mandate by New York State law to utilize the latest Federal census for the purposes of legislative apportionment, Westchester County was pleased that the Census Bureau, at long last, planned to mitigate both the net undercounting of the total population and differential undercounting in the 2000 decennial census through the use of sophisticated statistical sampling techniques (*i.e.* using information derived from a portion of a population to infer information on the population as a whole) approved by the National Academy of Sciences and other prominent, objective authorities. Specifically, the Census Bureau's plan for the 2000 census proposed to utilize statistical sampling in three different phases: (1) the use of sampling in the Postal Vacancy Check program to verify the United States Postal Service's determination that certain housing units are vacant and to correct for anticipated errors in this designation; (2) the use of sampling techniques in the Nonresponse Follow-up phase of

the census; and (3) the use of a post-census survey, referred to as Integrated Coverage Measurement.

Westchester County concurs with the Census Bureau's assessment that statistical sampling is scientifically based; improves accuracy; eliminates the traditional undercount of children, renters and minorities; and saves money. In other words, the use of statistical sampling will result in a far more accurate and cost-effective census. In addition, a more accurate census will ameliorate the current problems previously experienced by the local governments, such as Westchester County, with respect to its own redistricting and will ultimately result in providing "truer representation" for the population as a whole.

However, the Court below has held that the use of statistical sampling to determine the population for purposes of apportioning representatives in Congress among the states violates the Census Act, 13 U.S.C. section 1 et seq. The District Court permanently enjoined the Department of Commerce and the Census Bureau from using statistical sampling, including its program for Nonresponse Follow-up and Integrated Coverage Measurement, to determine the population for the purposes of congressional apportionment. The District Court's rationale was primarily based upon its interpretation that 13 U.S.C. sections 141 and 195, when read together, do not authorize the use of statistical sampling with respect to the congressional apportionment.

This ruling by the United States District Court not only impacts the United States congressional apportionment but, in light of the laws of the State of New York, also directly affects the ability of Westchester County to appropriately apportion its legislative districts as well.

Currently, the use of statistics is widespread and the importance of the information that they provide should not be underestimated. Statistics are utilized in a variety of fields and professions, including but not limited to medicine, sports, government, history, sciences, business, education and economics. Statistics have been used to determine and/or discover a variety of issues in an effort to appropriately identify, address and improve upon those issues. For example, statistics have been utilized by the governments, businesses and even the judiciary, to evaluate productivity, efficiency and cost-effectiveness. Statistical results have been used by these entities, and others, for reorganization of resources and personnel which ultimately results in more efficient operations. Even the United States Congress has recognized the value of the use of statistics as evidenced by the enactment of 13 U.S.C. sections 141, 193 and 195. Each of these sections authorizes the use of statistics, including statistical sampling, in conjunction with the taking of a census.

However, the United States District Court's decision (Lamberth, J.) stated that because Congress appears to have excluded the use of statistical sampling with respect to the

apportionment of Congress in section 195; and did not specifically authorize the use of statistical sampling with respect to the apportionment of Congress in any other provision which authorizes the use of statistical sampling, the Census Bureau was prohibited from utilizing statistical sampling in connection with the year 2000 census.

According to the United States District Court, "[t]he interpretation of two provisions of the Census Act, section 141(a) and 195, is ultimately determinative as to whether statistical adjustment to the initial headcount is permissible or proscribed." 1998 U.S. Dist. LEXSEE 13133 at pg. 26. According to the District Court, despite the fact that the Secretary of Commerce is authorized to use statistical sampling, if the Secretary deems it appropriate, the Secretary is not specifically authorized to use of sampling procedures in connection with the apportionment of Representatives. Consequently, the District Court held that the Census Bureau is prohibited from utilizing statistical sampling for the year 2000 census.

A census is supposed to be an enumeration of a population. See generally *Rochester v. County of Monroe*, 93 A.D.2d 625, 462 N.Y.S.2d 939 (4th Dep't 1983). The term "census" does not have a separate and distinct meaning when utilized in connection with congressional reapportionment or, in the case of Westchester County, with legislative redistricting. However, the District Court has interpreted the



term "census" according to its ultimate use as opposed to its primary purpose. In other words, there are two separate ways in which to interpret "census" depending upon whether it is to be used for redistricting or some other purpose. What is important is the accuracy of the census and not the purpose for which the census is used.

Furthermore, any justification for a distinction in the definition of the term "census" insofar as it relates to congressional apportionment is clearly outweighed by the disparate impact that ultimately results from the differential undercounting of the population. Moreover, the inadequacies that the undercount and differential undercounting cause at the federal level are accentuated at the local governmental levels, such as Westchester County.

This Honorable Court has already commented on the negative impact which results at the local levels from the federal census:

- Approximately one-third of the Justice Department's objections have been to redistrictings at the state, county and city levels. (S. Hearings 539-540, 581-582). This past experience ought not be ignored in terms of assessing the future need for the Act. It is ironic that the Supreme Court's one man-one vote" ruling [*Reynolds v. Sims*, 377 U.S. 533 (1964)] has created opportunities to disfranchise minority voters...

*McDaniel v. Sanchez*, 452 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981).

Here, the Census Bureau, in accordance with its authority to utilize statistical sampling pursuant to 13 U.S.C. sections 141, 193, and 195, has attempted to minimize the inaccuracies which result in undercounting the American population. The more accurate the census, the more accurate the representation of the population as a whole. As stated in *Gaffney v. Cummings*, 412 U.S. 735, 744, 93 S.Ct. 2321, 2326-7, 37 L.Ed.2d 298 (1973),

Substantial equality of population among the various districts [is required], so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state... In other words, an individual's right to vote ... is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared to the votes of citizens living in other parts of the state...(citations omitted).

In the instant case, the failure to utilize statistical sampling in the year 2000 census will result in substantial population variations. The District Court's determination to prohibit the use of statistical sampling in the federal census for the year 2000 has effectively destroyed the equality of votes, especially when utilized by the local legislative branches of government such as Westchester County.

It is imperative that this Honorable Court dispense with the unwarranted distinctions between a census for one purpose versus another purpose and uphold the importance of

achieving the most accurate census possible at this time. Only then, will the entire American population be adequately represented at the local, state and federal levels of government in accordance with the dictates to the Constitution of the United States of America.

## CONCLUSION

For the foregoing reasons, the Order and Judgment of the United States District Court for the District of Columbia (Lamberth, U.S.D.J.) dated and entered on August 24, 1998, should be reversed in its entirety thereby enabling the Census Bureau to utilize statistical sampling as part of its plan for the 2000 decennial census.

Date: White Plains, New York  
October 5, 1998

Respectfully submitted,

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In The  
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October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,  
*Appellants,*  
v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,  
*Appellees.*

On Appeal From The United States District Court  
For The District Of Columbia

MOTION TO FILE BRIEF AS AMICI CURIAE  
IN SUPPORT OF APPELLANTS AND BRIEF  
OF JEROME GRAY, SHERMAN NORFLEET,  
GWENDOLYN PATTON, ISAIAH SUMBRY, DIANNE  
WILKERSON, AMERICAN JEWISH COMMITTEE,  
AMERICAN JEWISH CONGRESS, AND  
NATIONAL URBAN LEAGUE AS AMICI CURIAE

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## MOTION AND BRIEF OF AMICI GRAY ET AL.<sup>1</sup>

### Introduction

The amici Jerome Gray, Sherman Norfleet, Gwendolyn Patton, Isaiah Sumbry, Dianne Wilkerson, the American Jewish Committee, the American Jewish Congress, and the National Urban League submit this brief in support of the position of the appellants Secretary of Commerce and others (the "Secretary").<sup>2</sup> Affirming the decision below would prohibit the Secretary from using statistical sampling in the decennial census for the year 2000 ("Census 2000") to determine the population of the several states for the purpose of apportionment of the House of Representatives. This would deprive the Secretary of Commerce of the ability to use methods that he has determined are necessary to obtain an accurate population count and to avoid a significant undercount of minority groups. The Secretary's decision to use the most accurate census methods available is authorized by statute and promotes the Constitutional goal of equal representation, and the decision below should be reversed.

### Interest of the Amici

Each individual amicus is an African-American citizen and voter residing in a black-majority district used to elect a member of the legislature of his or her respective State. Amicus Jerome Gray is a voter in the State of Alabama, residing in House District 68. Amicus Sherman Norfleet is a voter in the State of Alabama,

<sup>1</sup> This brief was not authored in whole or part by any counsel for a party. No person or entity, other than the *amicus curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> All parties to the case, except the Department of Commerce, have consented to the filing of this brief, as evidenced by their letters of consent lodged with the Clerk. The interest of the *amici* is set out *infra*.



residing in House District 72. Amicus Gwendolyn Patton is a voter in the State of Alabama, residing in House District 77. Amicus Isaiah Sumbry is a voter in the State of Alabama, residing in House District 83. Amicus Dianne Wilkerson is a voter in the Commonwealth of Massachusetts, a resident of the Second Suffolk (Senate) District. Whites constitute the vast majority of the residents of each of these states.

The individual amici have an interest in the outcome of this litigation. If the appellee House of Representatives is successful in blocking the use of statistical sampling in Census 2000, the Census Bureau predicts that African-Americans will be undercounted to a substantially greater degree than whites. This differential undercount will adversely affect amici and other African-Americans (and indeed all members of minority groups) in a number of ways. In some circumstances, the undercount will actually deprive a state of one or more representatives, who would have represented districts with substantial African-American or minority populations. Even when that is not the case, the undercount of a minority population in a district will reduce the legitimate influence of that group and the interests it represents, denying it the full representation that would come only with their Representative knowing that he or she speaks for them and that they can speak in turn at the next election. More generally, a census that undercounts African-Americans (and other racial and ethnic minorities) will deprive them as a group of the influence on our political system that their actual numbers warrant, both on a national and state level and in smaller political subdivisions where they might constitute a larger percentage of the population.

Moreover, a differential undercount adversely affects the voting rights of the individual amici in specific ways at the district level. First, if there is a differential undercount of minorities relative to whites, the amici are in more danger than whites of being placed in districts that are unconstitutionally malapportioned. Second, if there is a differential undercount of blacks or Hispanics relative to whites,

creation of majority-minority districts where necessary to comply with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, will become more difficult. *See infra*, pp. 4-6.

The American Jewish Committee, a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of the Committee that those rights will be secure only when the civil and religious rights of Americans of all faiths are equally secure. For this reason, the American Jewish Committee strongly believes that the census undercount must be corrected.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the political, civil, religious and economic rights of Jews and all Americans. It believes that security for Jews is dependent on the fair treatment of all Americans. The undercount in the Census threatens that interest not only because it affects the vital public interest in fair representation, but because it skews the distribution of governmental aid. It believes that with proper safeguards against politically motivated distortions, the Census Bureau can use sampling techniques to produce a more accurate census.

The National Urban League, founded in 1910, was organized to assist African-Americans in the achievement of social and economic equality. The League, composed of 115 affiliates in 34 states, is committed to providing assistance in areas of concern such as employment, housing, education, social welfare, development of inner city youth, economic self-sufficiency, and racial inclusion. The League carries out its mission at the local, state, and national levels by providing direct services to individuals, by building bridges between all segments of society, and by engaging in principled advocacy, community mobilization, social marketing, and communications on behalf of those it serves. Many of the League's programs are supported by federal grants. The League has a strong interest in ensuring that the African-American community is

accurately counted in the census and fairly represented in Congress.

*Argument*

**I. If the Secretary is Denied the Use of the Methods He Has Selected to Perform Census 2000, the Differential Undercount Will Seriously Harm the Interests of the Amici.**

In its Report To Congress — The Plan For Census 2000 (the "Report To Congress"), the Bureau of the Census reported that the methods that it had employed in previous censuses could not sufficiently remedy the undercount, and especially the differential undercount of minorities, that had led to a decrease in accuracy between the 1980 and 1990 censuses. Report To Congress at x, 2. Among the lessons learned from the 1990 census was that some groups were counted less effectively than others, including children, renters (particularly in rural areas), and racial and ethnic minorities, with the undercount rate for African-Americans six times greater, the rate for Hispanics seven times greater, and the rate for American Indians more than seventeen times greater, than that for non-Hispanic whites. Report To Congress at 2-4.

The differential undercount will cause states to misdraw the lines of their Congressional and other sub-state districts. For example, assume that a state has a reported population of 3.5 million, of whom exactly 25% are black and 75% are white, and that the reported figures are wrong because the state had an undercount rate of 5% for blacks and 1% for whites. The following table shows the reported and true populations:

Whole State	Reported Pop.	Undercount Rate	True Pop.
Whites	2,625,000	1%	2,651,515
Blacks	875,000	5%	921,053
TOTAL	3,500,000		3,572,568

Depending on the mix of blacks and whites in various areas of the state, districts drawn to contain exactly the same population may be above or below the norm. Assume that the state is entitled to seven members of Congress. The table below shows two districts with different demographic mixes:<sup>3</sup>

District 1	Reported Pop.	Undercount Rate	True Pop.
Whites	200,000	1%	202,020
Blacks	300,000	5%	315,789
TOTAL	500,000		517,809

District 2			
Whites	450,000	1%	454,545
Blacks	50,000	5%	52,632
TOTAL	500,000		507,177

In this situation, District One is 101.46% of the state's average

<sup>3</sup> While this example assumes a uniform undercount within each racial group, in reality the undercount may vary within each group from place to place.



district size (510,367, which is the total state population of 3,572,568 divided by 7), and District Two is 99.38% of average. These two districts have a total deviation from the norm of 2.08%, which is almost three times as large as the deviation of 0.6984% found — and disapproved by this Court — in *Karcher v. Daggett*, 462 U.S. 725 (1983).

District One is relatively underrepresented because it has a large concentration of blacks. District Two has a relatively small undercount because it has fewer blacks. Thus, both blacks and whites will be underrepresented if they live near concentrations of blacks.

Assume further that our hypothetical state is one in which there has been a history of racially polarized voting, so that blacks have found it nearly impossible to elect candidates of their choice except in black majority districts. If a legislature or court were trying to draw black-majority districts,<sup>4</sup> the differential undercount would make it difficult for the drafters to fine tune their plan. They might, for instance, draw districts with far more blacks than they needed — simply because the Census showed a lower number lived in the area.

Similarly, the drafters might give up on the idea of drawing one black district because of an apparent lack of a black majority. Instead, they might divide the black residential concentration between two predominantly white districts.

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<sup>4</sup> A court or legislature may intentionally create black majority districts when necessary to remedy a violation of Section 2 of the Voting Rights Act. See *Miller v. Johnson*, 515 U.S. 900, 928-29 (1995) (O'Connor, J., concurring).

## II. The Census Act Authorizes the Secretary to Use Sampling in Conducting the Decennial Census for All Purposes, Including Apportionment of Representatives in Congress among the Several States.

### A. A straightforward reading that reasonably construes all provisions of the Census Act shows that it gives the Secretary discretion to use sampling in determining population for apportionment purposes.

Congress has exercised the “virtually unlimited discretion” accorded it by the Constitution in conducting the decennial census, see *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996), by unambiguously conferring on the Secretary of Commerce broad authority to conduct the decennial census “in such form and content as he may determine, including the use of sampling procedures and special surveys.” 13 U.S.C. § 141(a) (emphasis added). That the authorization in Section 141(a) to use sampling extends to the determination of the population for the apportionment of Representatives in Congress among the several States is clear from Section 141(b), which requires that “the tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States” must be completed within 9 months after the census date. 13 U.S.C. § 141(b).

That broad authority of the Secretary under Section 141 to use sampling procedures in taking the decennial census is neither withdrawn nor narrowed in any way by 13 U.S.C. § 195. That section provides:

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as “sampling” in carrying out the provisions of this title.

13 U.S.C. § 195. The words and the sentence structure of that provision make it clear that, far from narrowing the broad authorization of the Secretary in Section 141 to use sampling in taking the decennial census, Section 195 *commands* the Secretary, if he considers it feasible, to exercise that authority to use sampling in carrying out all aspects of the census "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States." That "except" provision in Section 195 does not apply to the Secretary's *authority* under Section 141 to use sampling for *all* aspects of the census but only to the *requirement* in Section 195 that the Secretary use sampling, if feasible, for certain aspects of the census.

Thus, the plain language and the structure of Sections 141 and 195 of Title 13 make it clear that Congress gave the Secretary the *authority* to use sampling for *all* aspects of the decennial census (Section 141) but imposed on him the *obligation* to use sampling, where feasible, only with respect to the non-apportionment aspects of the decennial census (Section 195). As to that single excepted aspect of the census, Sections 141 and 195 leave the Secretary free to use his sampling authority or not, as he sees fit.<sup>5</sup>

**B. The district court ignored basic principles of statutory construction by construing ambiguous Section 195 of the Census Act in isolation, and then using it to undermine the unambiguous authorization in Section 141.**

The opinion of the three-judge court below taking a contrary

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<sup>5</sup> Courts have agreed with this analysis of Section 195. See *City of New York v. United States Department of Commerce*, 34 F.3d 1114, 1124-25 (2d Cir. 1994), *rev'd on other grounds sub nom. Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1333 (E.D. Mich. 1980), *rev'd on jurisdictional grounds*, 652 F.2d 617 (6th Cir. 1981).

view is at odds with a number of the most basic precepts of statutory construction, as enunciated in numerous decisions of this Court. In its opinion the court below acknowledged that the 1976 amendments of the Census Act amended two provisions of that act with respect to the use of sampling for taking the census, Sections 141 and 195. But then, instead of considering those two closely related provisions together in order to construe them, if possible, in harmony with each other, the court first considered Section 195, which it acknowledged was ambiguous, in isolation and construed it without any reference to, or consideration of, Section 141 (JS, 50a-59a). The court adopted a reading of the ambiguous Section 195 that it acknowledged is in conflict with Section 141, which is unambiguous, and then concluded that in such conflict Section 195 controls because it is the more specific of the two sections with respect to the use of sampling (JS, 61a-62a).

These amici respectfully submit that such an approach to the issue of statutory construction posed by this case is dead wrong. In its approach the court made no effort to arrive at a construction of Sections 141 and 195 that harmonizes them but instead took the indefensible position that in the same statute — the 1976 amendments to the Census Act — Congress irrationally made significant changes in Sections 141 and 195 that put them in conflict, rather than in harmony, with each other. In reaching that conclusion, the court violated the teachings of many decisions of this Court with respect to statutory interpretation.

In the first place, the court improperly ignored the basic rule of statutory construction that the existence of a possible statutory ambiguity that calls for judicial interpretation is not to be determined by considering the disputed provision in isolation, as the court did here, but "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 846 (1997); see also *United States v. Morton*, 467 U.S. 822, 828 (1984). The structure of the court's opinion shows clearly that, in reaching its



construction of Section 195, the court considered only the language of that ambiguous provision, without any consideration of "the broader context of the statute as a whole," in particular, Section 141 (JS, 50a-59a). In its opinion, it is only after the court has examined Section 195 and concluded that it prohibits the use of sampling for Congressional apportionment that the court even looks at Section 141. When it finally gets around to examining that section, it acknowledges that Section 141(a) "appears to permit statistical sampling in congressional apportionment" (JS, 61a). Indeed, no other conclusion is possible with respect to the unambiguous language of Section 141(a).

In declaring that Sections 141 and 195 are in conflict so the more general Section 141 must give way to Section 195, the court violated other principles of statutory construction enunciated by this Court. In *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992), this Court directed that a court should give effect to two provisions of a statute "so long as there is no 'positive repugnancy' between the two laws," and that "courts should disfavor interpretations of statutes that render language superfluous . . ." And in *Department of Revenue v. ACF Indus.*, 510 U.S. 332, 340 (1994), this Court, quoting its prior decision in *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985), stated that is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."

By these statements this Court has made it clear that the various provisions of a statute are to be construed as in harmony, so as to give effect to all of them, if the language of the various provisions permits such an interpretation. That approach to statutory construction reflects the presumption that a rational body of lawmakers intends all the provisions of a statute to have meaning and effect and to be consistent with one another. Only if the language of those provisions compels the conclusion that there is a "positive repugnancy" between them must the court apply a canon of construction for resolving such a conflict.

1. The district court incorrectly resolved the ambiguity in Section 195 by ignoring the background provided by Section 141.

The language of Section 195 does not compel the conclusion that it prohibits the use of sampling for congressional apportionment so as to conflict with the provision of Section 141(a) that authorizes the use of sampling for all purposes. With regard to the Secretary's straightforward interpretation of Section 195, whereby the "except" clause simply provides an exception to the "shall" clause, the court below acknowledged that "defendants' interpretation of the except/shall sentence structure is proper in some instances"; that other federal statutes that, like Section 195, employ an except/shall sentence structure do not proscribe the excepted activity; and that at least one other court has construed Section 195 in the same manner, *i.e.*, that excepting from the sampling mandate the use of sampling for Congressional apportionment does not proscribe the use of sampling for that purpose. *Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D.Pa. 1980). Nevertheless, the court rejected that construction of Section 195 on the ground that "[c]ommon sense and background knowledge concerning the subject matter of the exception dictate that the 'except' clause must be read as prohibitory" (JS, 52a).

The court sought to support its conclusion through two homely examples, but their use in this context simply compounds the error of the court's failure to consider the statute as a unified expression of Congress' intent. The court contended:

First, an exception from a command to do "X" more often than not represents a prohibition against doing "X" with respect to the subject matter covered by the exception. In the party hypothetical [posited by the court], one would expect that the person who issued the directive "except for Mary, all children at the party shall be served cake"

would be quite surprised to learn that Mary had been served cake.

JS, 52a. However, even if the court's conjecture about serving cake to Mary were correct, it would be irrelevant to interpretation of the Census Act, because the party cake directive is presented as an independent command, with no background context or information about other commands directed to, or information available to, the hearer. Such a presentation is possible, of course, only because the court's discussion of Section 195 ignored Section 141, which provides Congress' basic directive to the Secretary about how the census should be conducted — namely, "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a).

The court's reliance on another hypothetical was equally unsupported and even more strikingly ignored the context in which Section 195 appears. With respect to the words "except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners," the court speculated that "[i]t is far more likely that the granddaughter would be upset if the recipient of her directive were to take the wedding dress to the cleaners and subsequently argue that she had left this decision to his discretion" (JS, 53a). That, the court said, is because we have "background knowledge" that wedding dresses are "extraordinarily fragile and of deep sentimental value to family members. We therefore would not expect that the decision to take a dress to the cleaners would be purely discretionary." (Ibid.)

Enamored of its analogy, the court added, "The apportionment of congressional representatives among the states is the wedding dress in the closet," because "[w]e have a prior understanding that demands the conclusion that whether to use statistical sampling is not to be left to the discretion of the Secretary of Commerce absent a more direct congressional pronouncement." (Ibid.) That "prior understanding" is an understanding of "the special position occupied

by congressional apportionment in the universe of functions entrusted to the Bureau of the Census" (JS, 54a). However, that special position is as much a reason to conclude that Congress permitted the Secretary to exercise his discretion in determining the best method of conducting the census for apportionment purposes as it is to conclude that Congress tied the Secretary's hands in that regard. Furthermore, extraordinarily, when looking for background knowledge that might resolve the ambiguity in Section 195, the court looked only to pre-1976 history and totally ignored the "more direct congressional pronouncement" in Section 141, only a few sections earlier in the same statute!

The court was correct in noting that there was a "prior understanding" before the 1976 amendments that the use of sampling for Congressional apportionment was not to be left to the discretion of the Secretary of Commerce. That is because, prior to the 1976 amendments, the only authorization in the Census Act of the use of sampling for any census purposes was the provision in Section 195 that the Secretary of Commerce "may" use sampling for census purposes except for Congressional apportionment. In the court's view Congress would not have changed that "prior understanding" about such an important matter by way of what the court characterized as "a permissive negative inference from an exception to a statutory mandate" in Section 195. But that, of course, is not all that Congress did in the 1976 amendments of the Census Act. In Section 141, Congress expressly ordered the Secretary to "take a decennial census . . . in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a). Congress clearly intended that census to provide the population tabulation required for the apportionment of Representatives, for it required that the "tabulation . . . as required for the apportionment of Representatives in Congress among the several states" be completed by a certain date. 13 U.S.C. § 141(b). Knowledge of that Congressional requirement — what Congress plainly said in the same statute — is the background knowledge necessary to resolve any ambiguity in



Section 195, not conjecture about Congress' weighing of the desirability of administrative discretion.

2. **The district court failed to give proper weight to the unambiguous wording of Section 141 authorizing the Secretary to use sampling procedures to conduct the census.**

The willingness of the court below to ignore Section 141 is apparent not only in its discussion of wedding dresses but in its fleeting review of Section 141 itself. The court notes the Secretary's argument that because Section 141(a), which "constitutes the sole authority to take the decennial census," expressly permits the use of sampling, and Section 141(b) expressly refers to the "tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several states," the use of sampling must be permitted in performing that apportionment tabulation (JS, 60a). However, the court offers no rebuttal to that argument, except to recite the House's contention that because Section 141(g) defines "census of population" to mean "a census of population, housing, and matters relating to population and housing," the reference to sampling in Section 141(a) "applies only to the myriad of demographic data that the Bureau collects in conjunction with the decennial enumeration" (JS, 60a).

That rebuttal, however, is plainly invalid. If one substitutes the definition of "census of population" given in Section 141(g) for the term as it appears in Section 141(a), Section 141(a) becomes:

- (a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population, housing, and matters relating to population and housing as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of

sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

The substitution neither supports the House's position nor introduces any ambiguity into Section 141(a). To the contrary, the section remains an unequivocal authorization for the Secretary to use his discretion in conducting the census of population *and* housing *and* matters relating to both "in such form and content as he may determine, including the use of sampling procedures and special surveys." The last sentence of Section 141(a) also authorizes the Secretary to collect "the myriad of demographic data" referred to by the court below, but the authorization of sampling appears not in that sentence but in the preceding sentence in which the Secretary is commanded to take the "decennial census of population."

The other argument of the House that the district court recites, apparently with approval, is that "the broad authorization of Section 141 to use sampling in most aspects of data collection cannot affect the prohibition concerning apportionment in Section 195, because, if it did, the 'except' clause of Section 195 would be rendered meaningless" (JS, 60a). However, since Section 141 provides authorization to use sampling not simply "in most aspects of data collection" but to use sampling however the Secretary may determine in "tak[ing] a decennial census of population," the court misstates the meaning of Section 141. If Section 195 is construed in the straightforward way in which the Secretary construes it, the "except" clause of that section is not meaningless at all, but simply excepts the determination of population for purposes of apportionment of Representatives from the *requirement* that the Secretary use sampling to carry out the provisions of Title 13, leaving it to the Secretary's *discretion*, as provided in Section 141,

whether to use sampling in making that determination.<sup>6</sup>

It is the construction of the Census Act adopted by the district court and the House that renders a portion of that act meaningless. On their reading, Section 195 directs the Secretary to use sampling in carrying out all his duties under the Census Act except for determining population for apportionment purposes, and *also* prohibits the Secretary from using sampling in making the latter determination. That covers the field with regard to the use of sampling, and there is nothing left to be covered by the explicit authorization in Section 141(a) for the Secretary to conduct the census in such form and content as he may determine, "including the use of sampling procedures and special surveys."

It is not a credible reading of the statutory language that Congress adopted in 1976 to read out of Section 141 (the central provision of the Census Act that provides the statutory basis for the Secretary's taking the decennial census) an explicit, unambiguous, and unrestricted authorization for the Secretary to use sampling to conduct that census, on the basis of an ambiguously worded subsidiary provision for which there is a reasonable alternative construction. If Congress meant, in adopting the 1976 changes to the Census Act, to do just what the Secretary says it meant — to authorize him to use sampling in his discretion in determining population for apportionment purposes, and to require him to use sampling, if feasible, for other Census Act purposes — it would have said just what it did in Sections 141 and 195 of the Act.

In light of Congress' unequivocal grant of authority to the

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<sup>6</sup> The presence of the phrase "if he considers it feasible" in Section 195 does not change this conclusion. The provision remains a directive that, if the minimum requirement of feasibility is met, the Secretary use sampling in non-apportionment aspects of the census. Such a directive gives the Secretary considerably less leeway not to use sampling than if it had simply been left to his discretion, as it is in Section 141.

Secretary to use sampling in taking the census, a court should require unambiguous language elsewhere in the statute, even in a "more specific" provision, to render that grant meaningless. Section 195 does not contain such unambiguous language. Had Congress in fact intended not to permit the Secretary to use his broad authority under Section 141 to determine population for apportionment purposes, it could easily have said so, *e.g.*, by providing, "The Secretary shall not authorize the use of the statistical method known as 'sampling' for the determination of population for purposes of apportionment of Representatives in Congress among the several states. The Secretary shall, if he considers it feasible, authorize the use of sampling in carrying out the other provisions of this title." However, Congress did not so provide. Instead, it simply excepted the determination of population for purposes of apportionment from the requirement that, if feasible, sampling be used in carrying out the provisions of the statute, thereby leaving the use of sampling for apportionment purposes to the Secretary's discretion as provided in Section 141.

A fair reading of Section 195, considered together with Section 141(a), is that Section 195 deals with one subject — the mandatory use of the sampling that was authorized by Section 141(a) — and that it mandated the use of sampling for all purposes except congressional apportionment. To construe the "except" clause of Section 195 to mean anything more than that use for Congressional apportionment was simply excluded from the sampling mandate of that section is to give it a reading the words do not require and the language of Section 141(a) rejects. Reading Section 195 as mandating the use of sampling for non-apportionment purposes and leaving the use of sampling for apportionment purposes subject to the discretionary authority conferred on the Secretary by Section 141(a) does no violence to the language of either Section 141(a) or Section 195 and gives full effect to both provisions. The interpretation of Section 195 by the court below, on the other hand, severely limits the broad discretion Congress obviously intended to confer on the Secretary in the taking of the decennial census,



including the use of sampling for all purposes.

**3. The district court's resort to legislative history also ignored the clear language of the Census Act.**

The court also sought to support its view of Section 195 by accepting the House's argument that Congress would not have legislated such a departure from past practice in Section 195 without a clear indication of its intent to do so in the legislative history of the 1976 amendments. In support of that argument the court cited language from a dissenting opinion by then-Justice Rehnquist in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980), that "where the construction of legislative language . . . makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." While, as the district court notes, that language was subsequently quoted in *Chisom v. Roemer*, 501 U.S. 380, 396, note 23 (1991), the *Harrison* Court flatly rejected, in construing the statute involved in that case, use of "the theory of the dog that did not bark." 446 U.S. at 592.

The use of that theory is particularly inappropriate with respect to a statute such as the 1976 amendments to the Census Act. The fact is that the dog did bark, and at the place where its message was most unmistakable — in the language of the statute itself. Prior to the 1976 amendments, the only authorization for the use of sampling was that in Section 195 for purposes other than congressional apportionment. But in 1976 Congress added language to Section 141(a) expressly authorizing the Secretary to take the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys."

It is apparent that by expanding the role of sampling in both Sections 141(a) and 195 in 1976 Congress expressed enhanced confidence in the reliability of sampling to measure the population. That enhanced confidence is reflected in language from the

Conference Report on the 1976 amendments that is quoted in the opinion of the court below: "This section [195], as amended, strengthens the Congressional intent that, whenever possible, sampling shall be used." (Emphasis added.) With such expressed confidence in the reliability of sampling, there is simply no basis for reading Sections 141 and 195 to mean anything but that Congress was changing the use of sampling for non-apportionment purposes from permissive to mandatory and changing the use of sampling for apportionment purposes from prohibited to permissive.

**III. The Constitution Does Not Prohibit the Use of Statistical Sampling in Determining Apportionment in the Decennial Census.**

Although the district court did not address the House's contention that the Constitution prohibits the use of statistical sampling in conducting Census 2000, if this Court finds that the Census Act does not prohibit such use it may wish to address the constitutional issue, so as to avoid further delay in the Secretary's implementation of plans for Census 2000. Amici submit that the Constitution not only permits the Secretary to use sampling procedures in conducting that census, but that, given the scientific and demographic evidence before him, it is the only feasible way for him to carry out the Constitutional mandate.

Even the House does not dispute the desirability of improving the accuracy of Census 2000 or reducing the differential undercount, and it cannot dispute the conclusions reached by the Secretary, with advice from special expert panels of the National Academy of Sciences (the "Academy"), that

It is fruitless to continue trying to count every last person with traditional Census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 Census using traditional methods, as it has in previous Censuses, will not lead to

improved coverage or data quality.

Report To Congress at 7 (quoting finding of Academy Panel on Census Requirements in the Year 2000 and Beyond). The House therefore claims that the Constitution prohibits the Secretary from using more accurate methods of determining population. That argument is not correct.

The House contends that the Secretary's decision to use statistical sampling to improve the accuracy of Census 2000 violates the Constitution because it would not constitute an "actual Enumeration," which, it contends, refers only to a "headcount," and not to what it calls a "statistical estimation." According to the House, the Constitution requires the Secretary to ignore the advice that sampling procedures be used in Census 2000 that he received from the Academy, including three panels established by its Committee on National Statistics to study how to improve Census 2000, the American Statistical Association, the American Sociological Association, the General Accounting Office, and the Inspector General of the Department of Commerce, Report To Congress at 7-8, 24-25, and instead to employ the same methods that, the House claims, census takers have applied for 200 years, however inaccurate may be the results of those methods as applied to today's population. The House contends, that is, that the Constitution requires that a certain *procedure* be used for determining Congressional apportionment, not that a certain *result* be achieved. That procedure, it adds, must be basically the same one used at the time of the Constitutional Convention in 1787. Those arguments find no basis in the text of the Constitution, and there is no historical or other support for a refusal to use the best methods available to count every group of Americans fairly and accurately.

**A. The Constitution prescribes a specific goal — apportionment according to the numbers of persons in the several states — rather than a specific procedure for determining the numbers to be used for such apportionment.**

- 1. Article I requires Congressional apportionment on the basis of the "respective Numbers" of the states, not on the basis of a particular procedure for determining those numbers.**

Despite the House's contentions, the Constitution does not enshrine the census technology of the Eighteenth Century. It sets out what result must be achieved — apportionment of Representatives on the basis of "the whole numbers of persons in each State," *see* U.S. Const. amend. XIV, § 2, and it leaves to Congress the responsibility of establishing the manner in which those "numbers of persons in each State" are to be determined. Thus, the Constitutional Convention initially set out in a single sentence the principle for determining apportionment of the House of Representatives:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. Const. art. I, § 2, cl. 3, first sentence. The constitutional principle is simply that Representatives are to be apportioned among the states "according to their respective Numbers," and those numbers are to "be determined" by adding to "the whole Number of free Persons," excluding Indians not taxed, "three fifths of all other Persons." The remaining apportionment question before the



Constitutional Convention was *when* those numbers were to be determined, and the Convention answered that question in the second sentence of the clause: "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years . . . ." U.S. Const. art. I, § 2, cl. 3, second sentence.

The House plucks the term "actual Enumeration" from the second sentence of this clause and argues from those two words that Article I requires a particular *procedure* for determining the "respective Numbers" of the states, namely, what the House calls a "headcount." However, neither the words themselves nor their context can support such an argument. At the time of the Convention, as now, an "enumeration" is a determination of a number, and the word is often used to mean "census."<sup>7</sup> The addition of the modifier "actual" in this instance adds the requirements, in effect combining two senses of the word "actual" current at the time, that a census really be taken and that it ascertain the number of persons at the time it is taken.<sup>8</sup>

Not only do the words "actual Enumeration" not in themselves

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<sup>7</sup> Thus, the first meaning of "enumeration" given by the Oxford English Dictionary is "the action of ascertaining the number of something; *esp.* the taking a census of population; a census." *The Compact Oxford English Dictionary* 522 (2d ed. 1991) (original v. 5, p. 311). Its first example of the use of the term, from 1577, is "That holy man did rightly know the enumeration of the sacred Trinitie," and the second, from 1810, is "According to the enumeration in 1801, the population amounted to 1600 persons." *Id.*

<sup>8</sup> Thus, two of the definitions of "actual" given by the Oxford English Dictionary are "Existing in act or fact; really acted or acting; carried out; real; — opposed to *potential, possible, virtual, theoretical, ideal,*" and "In action or existence at the time, present, current." *The Compact Oxford English Dictionary* at 15 (original v. 1, p. 132). As an example of the latter sense, the entry quotes Edmund Burke's 1790 *French Revolution*: "If this be your actual situation, compared to the situation to which you were called." *Id.*

require that the census be conducted in any particular manner, but the Census Clause itself undercuts any such suggestion. First, it commences with the words "*The* actual Enumeration" (emphasis added), referring back to the "respective Numbers" that were to "be determined" according to the formula prescribed in the first sentence. If the second sentence had been intended to introduce the additional requirement that those numbers must be determined by a particular procedure, such as the one-by-one headcount method that the House endorses, the drafters would more naturally have written, "*An* actual Enumeration shall be made . . ." (emphasis added), indicating that the enumeration was a requirement not previously referred to. Second, the sentence expressly leaves it to Congress to prescribe the manner of conducting the census: The enumeration is to be made "in such Manner as [Congress] shall by Law direct." If the clause required that the census consist of a person by person headcount, its "Manner" would have already been determined by the Constitution itself rather than being left to Congress.

**2. The Fourteenth Amendment does not prescribe a particular method of determining the populations of the states.**

The Fourteenth Amendment does not, as the House argues, limit Congress' discretion under the Census Clause in determining the "Manner" by which the census may be conducted. The Fourteenth Amendment provides, in pertinent part,

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. . . .

U.S. Const. amend. XIV, § 2. This Amendment simplified the rule for determining apportionment: Inasmuch as all persons were now free, the census-taker need only determine "the whole number of persons in each State," without any need to determine which were

free and which were not and to count each person in the latter category as three fifths of a person.

The Fourteenth Amendment implicitly amends Article I, § 2, cl. 3, but it does not specify which sentences in that clause are amended. The first sentence of the Fourteenth Amendment plainly provides the substantive rule, different from that in the first sentence of Article I, § 2, cl. 3, for apportioning Representatives among the states. That *substantive* rule — apportion according to the number of persons in each state — does not leave room for any additional requirement that a particular *procedure* be used for ascertaining those numbers, and the wording of the amendment does not suggest that any room was intended to be left.<sup>9</sup> Thus if, contrary to the linguistic and historical evidence, the Census Clause imposed a procedural requirement on the manner in which the “respective Numbers” in the first sentence of Article I, § 2, cl. 3 were to be determined, that additional requirement did not survive adoption of the Fourteenth Amendment, which contains no intimation of any procedural requirement on the method of determining the “whole number of persons in each State.”

In its argument below the House did its best to ignore the fact that it is section 2 of the Fourteenth Amendment, not the Census Clause, that provides the rule for apportionment of the House of Representatives. Tacitly admitting that it is the Fourteenth Amendment, not Article 1, that controls, the House perforce argued

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<sup>9</sup> Logically, the Constitution cannot require *both* a particular procedure *and* a particular result, since use of the prescribed procedure may not lead to the prescribed result. Accordingly, an interpretation of the second sentence of Article I, § 2, cl. 3 whereby it imposes a procedural requirement, in addition to the substantive requirement imposed by the first sentence, faces the hurdle of logical inconsistency from the outset. An interpretation that would import a procedural requirement into section 2 of the Fourteenth Amendment, where none is even adverted to, would, in addition, ignore the decision of its drafters to omit any reference whatsoever to the “enumeration” on which the House bases its Article 1 argument.

that in the Fourteenth Amendment phrase “counting the whole number of persons in each State,” the term “counting” specifies the method by which the “whole number of persons” is to be determined, and that method is to count people one by one. The only support that the House could muster for this reading, however, was a dictionary entry for one of the several meanings of “count,” ignoring the fact that in the participial phrase “counting . . .” the term is generally used with a different primary sense, that of “to include in the reckoning; to reckon in.” *The Compact Oxford English Dictionary* at 346 (original v. 2, p. 1055) (including historical examples of the participial phrase used in this sense, in contrast to no such example for the sense cited by the House). In this sense, the term “counting” indicates *who* should be included in the enumeration, not *how* the number should be ascertained. In the context of the words “according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed” in the first sentence of section 2 of the Fourteenth Amendment, the purpose of which was to change a rule that counted only three-fifths of slaves to one in which every person counts equally, this — and not a requirement of “nam[ing] one by one,” as the House contended — is plainly the sense in which the word was used. The syntax of the sentence requires the same conclusion, since the phrase “counting . . . taxed” does not modify the subject of the sentence, “Representatives,” but the term “respective Numbers,” meaning that those numbers should include the whole number of persons, not three-fifths of some persons, in each state.

The focus of the Fourteenth Amendment is on equal protection of the laws and so, in the apportionment clause, on apportionment in accordance with the “whole number of persons in each State.” This change in the language reflected not only the abolition of slavery and so of counting each slave as only three fifths of a person but also the drafters’ reevaluation of the criterion for apportionment. Section 2 of the Fourteenth Amendment was drafted to make clear that the basis of representation would be “numbers,” which meant the “whole population,” as opposed to a more restrictive criterion



(e.g., voters).<sup>10</sup> Yet instead of acknowledging this goal of equal representation for the "whole number," the House would use the very phrase in which the drafters memorialized their intention to base representation on that goal — "counting the whole number of persons in each State" — to limit Congress' ability to "direct" the "Manner" of conducting the census by prescribing a procedure that we know *will not count* the whole number of persons in each state, and in particular will not count the whole number of black persons. To read this amendment (the animating purpose of which was to count former slaves equally with others for purposes of representation in Congress) to require a method of enumeration that knowingly undercounts the "whole population" of their descendants would be a regrettable and perverse result.

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<sup>10</sup> The drafters consciously opted for language that would include the "whole population." See Remarks of Senator Howard, May 23, 1866, *The Congressional Globe*, S.P. 2767, reprinted in *The Reconstruction Amendment Debates: The Legislative History and Contemporary Debates In Congress on the 13th, 14th and 15th Amendments* 220 (Alfred Avins, ed. 1967) (discussing a predecessor to the Fourteenth Amendment containing the same "counting" phrase) ("Its basis of representation is numbers, whether the numbers be white or black; that is, the whole population except untaxed Indians and persons excluded by the State laws for rebellion or other crime."); *id.* at 221 ("The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such, I think, after all is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property, this is the theory of the Constitution."); *id.* ("And, sir, the true basis of representation is the whole population. It is not property, it is not education, for great abuses would arise from the adoption of one or the other of these two tests. Experience has shown that numbers and numbers only is the only true and safe basis; while nothing is clearer than that property qualifications and educational qualifications have an inevitable aristocratic tendency — a thing to be avoided.").

**B. The Constitutional requirement of apportionment according to actual population figures rather than particular census-taking methods promotes the goals of objectivity and avoidance of political manipulation and the Constitutional goal of equal representation.**

In the court below the House sought to buttress its constitutional argument by contending that permitting the use of statistical sampling in conducting the census invites vagueness, subjectivity, and political manipulation. It sought to contrast unfavorably the "estimation" involved in "sampling" with the concept of "actual Enumeration" it prefers. But this elevates terminology over reality and contradicts the conclusion of the professional statisticians and demographers — experts in census-taking rather than politics, on whom the Secretary has preferred to rely — that the use of sampling in Census 2000 should minimize the opportunity for political manipulation, not increase it. Report To Congress at x.

Not only can traditional census methods provide only an estimate of the true population, but we know that they provide a systematically *inaccurate* estimate, and that "an accurate and cost-effective census cannot be taken without the introduction of a limited use of sampling." Report To Congress at x. The House claimed below that the use of procedures more complex than a "headcount" are subject to political manipulation and vagueness, and contrasted the desire of the framers of the Constitution for objectivity with what it called the "subjectivity" of statistical methods. However, if there is any safe harbor from "political manipulation," trying to count heads in a large and complex population cannot provide one. A census that can actually and accurately count the entire population, one by one, is a will-o'-the-wisp, as the House well knows.

In the debate over methods to be used in Census 2000, the issue is not whether to "sample" but whether to sample scientifically. Census takers have never been able to

contact and count each and every resident of this nation. As a result, information on less than the whole population has always been used to characterize the whole population.

Report To Congress at 23 (emphasis in original). Using traditional census methods will make the accuracy of the count, and the extent of the differential undercount of minorities, dependent upon the size of the budget allocated to the census, and even then a significant total undercount, and the recurring problem of the differential undercount, would be certain. Report To Congress at 33. In contrast to the exclusive use of traditional methods, which invites political manipulation through manipulating the size of the census budget and which rests on the hypocrisy inherent in purporting to try to reach an important goal without using the scientific techniques that one knows to be necessary to do so,

[s]ampling has known, objective properties. The known properties of sampling are preferable to the certainty of missing several million people using traditional counting methods alone. In fact, uncontrolled error is more of a concern with a traditional headcount than it is with sampling.

Report To Congress at 49.

The House's memoranda below were replete with references denigrating the methods planned by the Secretary as mere "estimation" as opposed to the "actual Enumeration" that it contends has hitherto been conducted. But that comparison is sheer rhetoric. Given the known impossibility of doing a headcount of the populations of the states, as if all their residents were lined up at their local polling places, the best that can be done to determine their "respective numbers" is to use the most accurate methods that a combination of traditional census techniques and modern statistics

and demographics can provide. See Report To Congress at 49-51.<sup>11</sup> While such methods, like the traditional "headcount," can only produce an "estimate," albeit a much more accurate one than ever achieved before, they have the advantage, unlike the inaccurate and invidiously discriminatory techniques preferred by the House, of providing the opportunity for ever more accurate estimates as experience is gained and techniques improve.

There is no safe harbor from political manipulation, but there is a requirement, set forth in the Constitution, that provides the

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<sup>11</sup> For example, the House argued below, referring to the discussion of proposed sampling procedures in the Census Bureau's Census 2000 Operational Plan, that the Secretary's proposal would not produce a precise number but only an "estimate," because the sampling procedures will involve a "sampling error," measured by a "coefficient of variation." Census 2000 Operational Plan at IX-24-25. However, the page and table to which the House referred show that when the sampling methods proposed by the Secretary are used, the error arising from the use of sampling is much smaller than the coverage error, commonly called the "undercount," that will occur if no statistical sampling methods are used. For example, the projected sampling error for the United States in total for Census 2000 is 0.1%, as compared to an undercount rate of 1.6% in the 1990 Census. Sampling methods would thus reduce the error from the 1990 census by 1.5% at the country-wide level. Sampling methods would reduce the error in the count of Blacks by 3.8% (0.6% sampling error vs. 4.4% undercount rate) and reduce the error in the count of persons of Hispanic origin by 4.2% (0.8% sampling error vs. 5.0% undercount rate). Census 2000 Operational Plan at IX-25. Thus the Secretary's so-called "statistical estimate" is 1600% more accurate at the country-wide level, 733% more accurate in the case of Blacks, and 625% more accurate in the case of persons of Hispanic origin, than what the House calls an "actual Enumeration" of the population produced in 1990. When one also takes into account the fact that the 1990 census made an exhaustive attempt to make traditional census-taking methods work, that the census-taking environment will be even more difficult in 2000 than in 1990, and that without sampling Census 2000 would cost at least an additional \$675 million and, even with that additional expenditure, would probably have a national undercount rate of 1.9%, as compared to the 1990 undercount of rate of 1.6%, Report to Congress at x-xi, 4-6, 37-39, Census 2000 Operational Plan at IX-25, it is apparent that the prohibition of sampling procedures in the 2000 Census would produce only an "estimate," and an "estimate" that would be considerably less precise than the use of scientific sampling methodology would make possible.



greatest protection from it: the requirement that "Representatives shall be apportioned among the several States according to their respective numbers . . ." The Constitutional goal of equal representation, *see Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996) (the Secretary's conduct must be consistent with "the constitutional language and the constitutional goal of equal representation" (internal quotation omitted)); *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992) (noting the "underlying constitutional goal of equal representation"); *Dept. of Commerce v. Montana*, 503 U.S. 442, 461 (1992) ("As we interpreted the constitutional command that Representatives be chosen 'by the People of the several States' to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States 'according to their respective Numbers' would also embody the same principle of equality."), is best served by determining, as accurately as possible, what the "respective numbers" of the states are, and following that polestar is the best safeguard against political manipulation. Demographic science and statistics provide the best available means for pursuing that goal, and the standards of good science and mathematics — those represented by the Academy, for example — provide little leeway for subjectivity or political manipulation. By contrast, when the Constitutional requirement of determining the "respective numbers" of the states is disregarded, and adherence to "traditional" methods of census-taking substituted as the goal, the way is open to political manipulation as the gap between reality and those traditional methods grows ever greater.

#### *Conclusion*

For the foregoing reasons, the Secretary's decision to use statistical sampling to supplement traditional census methods in Census 2000 is constitutional, authorized by statute, and promotes the Constitutional goal of equal protection and voting rights for all Americans. The judgment of the district court should be reversed.

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IN THE UNITED STATES SUPREME COURT  
— OCTOBER TERM, 1997

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UNITED STATES DEPARTMENT  
OF COMMERCE, *et al.*, Appellants,  
vs.  
UNITED STATES HOUSE OF  
REPRESENTATIVES, *et al.*, Appellees.

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On Appeal From The United States  
District Court For the District of Columbia

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**BRIEF OF AMICUS CURIAE STATE OF TEXAS  
IN SUPPORT OF APPELLEES, CITY OF LOS  
ANGELES, *et al.***

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No. 98-404

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IN THE UNITED STATES SUPREME COURT  
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ANGELES, *et al.*

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INTEREST OF *AMICUS CURIAE*  
STATE OF TEXAS

The Attorney General of the *amicus curiae* State of Texas submits this brief pursuant to Supreme Court Rule 37.4, on behalf of the State of Texas ("Texas") and its political subdivisions, to bring to the attention of the Court the adverse impact on Texas of the decision of the



three-judge court ("the lower court") in *United States House of Representatives v. United States Department of Commerce*, 11 F.Supp.2d 76 (D.D.C. 1998) (Memorandum Opinion Granting Plaintiffs' Motion for Summary Judgment) ("Memorandum Opinion"). Texas submits this brief in its capacity as *parens patriae* to: protect the right of all Texas residents to a fair and equitable distribution of federal funds and a fair and equitable apportionment of the United States House of Representatives. Texas also submits this brief in its capacity as *parens patriae* to ensure that the most accurate possible census figures are available for use by the state and its local political subdivisions. Additionally, Texas submits this brief in support of the position taken by Appellees City of Los Angeles, *et al.*, and urges this Court to reverse the decision of the court below.

### STATEMENT OF CASE

*Amicus*, Texas, adopts the statement of the case and the legal arguments presented and advanced by Appellees City of Los Angeles, *et al.*, but writes to present those facts and the concomitant law surrounding the prospective undercount which are unique to Texas and its political subdivisions.

### SUMMARY OF ARGUMENT

Texas is in a precarious position on the eve of the 2000 Decennial Census ("Census 2000"). It looks back in time and sees the undercount of its population in the 1990 Decennial Census and the resulting loss of federal funds and probable loss of congressional representation because of the failure to statistically adjust the census.

It looks forward to the year 2000 and sees the prospect of history repeating itself, except in the next decade the undercount in Texas will be greater. With a growing population of those that are traditionally undercounted, the loss of federal funds and equal representation would easily eclipse the losses of the last decade. These losses can be avoided by the use of statistical sampling, including nonresponse follow-up and Integrated Coverage Measurement, as currently proposed by the Bureau of the Census and supported by an overwhelming majority of scholars.

Texas may have more to lose than any other state if the total undercount and the differential undercount are not corrected. Texas – with one of the nation's largest populations of traditionally undercounted individuals – expects an undercount not only in its urban areas, but also in rural population clusters (whose extent and numbers are unique to Texas) called "colonias." Colonias stretch along Texas' international border with Mexico and contain all the demographic attributes that lead to chronic undercounting. With an estimated statewide population exceeding 392,000, colonias may constitute the most difficult enumeration problem in this country.

Texas wants nothing more than its fair share of congressional representation and federal dollars consistent with the Constitution's guarantees in art. I, § 2, cl. 3 and art. II, § 1, cl. 2. Therefore, Texas asks this Court to reverse the judgment of the lower court.

## ARGUMENT

### I. The Operational Plan of the 2000 Census is Designed to Produce the Most Accurate Figures Possible.

In the 1990 census, there was an alarming increase in the total undercount and the differential undercount<sup>1</sup> of minorities, the poor, renters, children, recent immigrants, individuals living in nontraditional housing units, highly mobile populations, and those living in neighborhood conditions that lead to resistance to outsiders. To counter this problem, the Secretary of Commerce and the U.S. Bureau of the Census ("Census Bureau"), with the cooperation of noted experts in almost every field of demography and statistics, began work on designing a comprehensive approach for taking the 2000 Census. See, e.g., REPORT TO CONGRESS ON THE STATUS OF THE YEAR 2000 DECENNIAL CENSUS PLANNING EFFORTS, 103D CONG. 12 (Jan. 26, 1994) (submitted by Secretary of Commerce Ronald H. Brown). As a result, the Department of Commerce and the Census Bureau devised a plan for the 2000 Census which will significantly reduce both the total undercount and the differential undercount. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, CENSUS 2000 OPERATIONAL PLAN (revised April 1998) at II-1 ("Operational Plan").

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<sup>1</sup> Differential undercount is the term used to describe the disproportionate undercount of certain groups -- minorities, recent immigrants, renters, children, and the poor -- relative to the total population. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, REPORT TO CONGRESS - THE PLAN FOR CENSUS (July 1997) ("Plan for Census 2000").

The Operational Plan includes an integrated set of procedures, including traditional non-sampling techniques and various statistical sampling techniques,<sup>2</sup> all geared toward producing a more accurate decennial census count. The Operational Plan and its various components constitute the only realistic approach to taking the most accurate census possible in the year 2000.

The idea that statistical sampling is somehow an extraneous procedure to taking the most accurate possible decennial census is outdated and unrealistic.<sup>3</sup> And, pouring more public funds into door-to-door interviews will not solve the problem. See *Plan for*

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<sup>2</sup> The Secretary of Commerce and the Census Bureau announced significant sampling procedures in three different programs: the use of sampling in the Postal Vacancy Check Program to verify vacant housing units; the use of "Nonresponse Follow-up" or "NRFU" to account for housing units that do not respond to the census forms by selecting, at random, a sample of nonresponding units to receive follow-up measures; and the use of a post-census survey designed to greatly improve the accuracy of the census, "Integrated Coverage Measurement" or "ICM", utilizing traditional Dual System Estimation. See *Plan for Census 2000* at 26-32.

<sup>3</sup> Census 2000 will not be the first time that the Census Bureau has used statistical methods to correct for problems in physical enumeration and to provide a more accurate final result. As early as 1940, statistical imputation was used when an enumerator knew that a housing unit was occupied, but could not obtain information on the number of people living in that unit. In 1980, statistical imputation raised the physical enumeration total by 761,000 people. In 1970, the Census Bureau used sampling to impute people to addresses that had initially been assumed vacant via The National Vacancy Check which added 1,068,882 people, or 0.5 percent of the total, to the 1970 Census. *Plan for Census 2000* at 23.



*Census 2000* at 7, citing the Panel on Census Requirements in the Year 2000 and Beyond. ("It is fruitless to continue trying to count every last person with traditional census methods of physical enumeration. Simply providing additional funds to enable the Census Bureau to carry out the 2000 Census using traditional methods, as it has in previous censuses, will not lead to improved coverage or data quality.").

The differential undercount -- the bane of recent censuses -- cannot be significantly reduced without adjustment via statistical sampling. See NATIONAL RESEARCH COUNCIL'S COMMITTEE ON NATIONAL STATISTICS PANEL TO EVALUATE ALTERNATIVE CENSUS METHODS, COUNTING PEOPLE IN THE INFORMATION AGE at 4-53 (1994) ("Differential undercount cannot be reduced to acceptable levels at acceptable costs without the use of integrated coverage measurement and the statistical methods associated with it. We endorse the use of integrated coverage measurement as an essential part of Census-taking in the 2000 census. . . .").

The Operational Plan for the 2000 Census includes statistical sampling and other features designed to work together to improve accuracy -- omitting statistical sampling eliminates that design's ability to achieve an accurate enumeration.

## II. Texas' Unique Situation Evinces the Need for Statistical Adjustment.

### A. Texas Was Undercounted in 1990 and the Undercount in 2000, Without Adjustment, Will Increase.

In 1990, Texas suffered a total undercount of 2.763 percent, compared to a 1.584 percent average nationwide total undercount.<sup>4</sup> Texas not only had the third largest percentage undercount in the nation (behind the District of Columbia and New Mexico), but also the second largest total undercount. Bureau *Assessment* at Attachment 4. The undercount for Texas metropolitan cities was 3.6 percent, or 251,221.<sup>5</sup> And, the total undercount for the remainder of Texas -- that is, the non-major city areas -- was 2.3 percent, or 231,517. *Id.* at Attachments 4 and 11. However, the total undercount figures for Texas only tell part of the story.

Due to Texas' increasing minority population in its inner cities and its rural areas, the 2000 Census undercount would almost certainly be larger than the 1990 undercount. The Census Bureau projects a Texas

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<sup>4</sup> U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, ASSESSMENT OF ACCURACY OF ADJUSTED VERSUS UNADJUSTED 1990 CENSUS BASE FOR USE IN INTERCENSAL ESTIMATES, Attachment 4 (1992) ("Bureau *Assessment*").

<sup>5</sup> Texas cities with a population of 250,000 or greater, and with large minority populations, suffered the largest undercount figures: Arlington, 2.82 percent; Austin, 3.629 percent; Corpus Christi, 3.622 percent; Dallas, 3.551 percent; El Paso, 4.256 percent; Fort Worth, 3.047 percent; Houston, 3.933 percent; and San Antonio, 3.918 percent. Bureau *Assessment* at Attachment 11.

minority population of 44.0 percent by the year 2000, compared to 28.2 percent nationwide.<sup>6</sup> Texas' growing population (in total and proportionately) of minorities, children (in 1990, over half of the undercounted were children),<sup>7</sup> renters, the poor, and other traditionally undercounted groups, will inevitably result in an increased undercount.

***B. Texas' Differential Undercount is Even More Disturbing than the Total Undercount.***

Texas, then, is facing an even larger total undercount in the 2000 Census, but in many ways Texas' differential undercount<sup>8</sup> is even more disturbing. The 1990 Census discriminated against minorities nationwide, and the effect was compounded in states with large minority populations. The nationwide differential undercount rate for African-Americans was 4.4 percent, and for Hispanics, 5.0 percent. *Plan for Census 2000* at 4. The effect of the differential undercount was particularly severe in Texas with an Hispanic population of 25.5 percent compared to 9.0 percent nationwide, and a total minority population of

<sup>6</sup> PAUL R. CAMPBELL, U.S. BUREAU OF THE CENSUS, POPULATION DIVISION, PPL-47, POPULATION PROJECTIONS FOR STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2025 at Detailed Table 3; see also, JENNIFER CHEESEMAN DAY, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P25-1130, POPULATION PROJECTIONS OF THE UNITED STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995 TO 2050 at 13 (1996) ("Cheeseman Day").

<sup>7</sup> *Plan for Census 2000* at 3.

<sup>8</sup> See *supra* at n.1.

39.4 percent compared to 24.4 percent in the United States.<sup>9</sup> Texas not only has large numbers of the groups that are traditionally undercounted (minorities, children, renters), it also has a large colonia population, see *infra* Subsection C, which, by all accounts, is undercounted at an even dramatically higher rate.

Without the use of statistical sampling, there will be a continuing differential undercount of these populations in the 2000 Census and all Texans, from those living in the smallest cities and rural counties, to those living in its largest cities and metropolitan counties, will suffer. The loss, and accompanying injury, is real, palpable, and of constitutional magnitude.

***C. Texas' Hidden Populations Exacerbate the Problems of a Traditional Count.***

Texas has a unique series of rural populations called "colonias"<sup>10</sup> along its entire 1,000-mile border with

<sup>9</sup> See, LAURA K. YAX, U.S. BUREAU OF THE CENSUS, 1990 TO 1997 ANNUAL TIME SERIES OF STATE POPULATION ESTIMATES BY RACE AND HISPANIC ORIGIN (1990) ("Yax"); see also, Cheeseman Day.

<sup>10</sup> Colonias "are highly concentrated poverty pockets that are physically and legally isolated from neighboring cities." TEXAS DEPT OF HUMAN SERVICES, A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH AND WEST TEXAS BORDER COUNTIES at 1-3 (June 1988) ("TDHS"). Their "superficial appearance is similar to Third World slums such as the bidonvilles of North Africa, favelas of Brazil, or barrios of Mexico." R. HOLZ & C. DAVIES, THIRD WORLD TEXAS: COLONIAS IN THE LOWER RIO GRANDE VALLEY at 4 (August 1989) (The University of Texas at Austin) ("Holz") (underlining in original). Most colonias have unpaved streets, poor drainage, and inadequate sewage disposal systems. When it rains or the level of the Rio Grande rises they are "quagmires of slippery mud" and the houses



Mexico that are "organized [squatter-like unincorporated] cluster[s] of generally substandard houses, constructed on small lots." Holz at 3.

The most recent study estimates a statewide colonia population of over 392,000.<sup>11</sup> Most of that population is young, poor, Hispanic, and unemployed. TDHS at 2-30. Colonia residents are not proficient in English and are poorly educated. Spanish is the primary language for 68.2 percent of the residents. Of those that do use English, most neither speak nor read it well. TDHS at 2-5. Two-thirds of colonia adults did not graduate from high school. See TDHS at 4-3.

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frequently "sit for several days surrounded by pools of . . . water heavily contaminated with" raw untreated sewage. Holz at 7. See also TDHS at 6-5 (43.9 percent of households reported flooding in their colonia). Colonias generally have no systems for delivering potable water. "An enduring mental image of colonias is the many one gallon, plastic water jugs that are seen in rubbish piles around the colonias." Holz at 8. Many of the poorer residents are forced to bathe in and drink the water found in irrigation and drainage ditches. See TDHS at 6-4. This water is frequently contaminated with sewage and agricultural chemicals. Holz at 8. The result is that disease is widespread. Colonia residents along the entire Texas border suffer from "highly infectious hepatitis A, nutritional disorders, diarrhea and skin rashes at five times the rate of the rest of the nation." Guillermo X. Garcia, *Health Crisis Looms as Colonias Seek Aid*, AUSTIN AMERICAN-STATESMAN, Mar. 31, 1990, at B1. See also TDHS at 3-4. Colonias do not have garbage or trash collection services. Consequently, trash piles with litter are found everywhere, as well as abandoned automobiles and discarded building materials. Holz at 10.

<sup>11</sup> TEXAS WATER DEVELOPMENT BOARD, WATER AND WASTEWATER SURVEY OF ECONOMICALLY DISTRESSED AREAS at 3 (December 1996).

Texas' unique borderland populations contain all the characteristics of areas that the U.S. Census Bureau has predicted will be undercounted: undocumented workers, those living in isolated poverty areas, and those individuals who do not read or speak English well. See *Bureau Assessment* at 3.

#### *D. Evidence Points to a Double Digit Undercount in Colonias.*

No one -- not the Census Bureau, nor any Texas state agency -- knows the precise extent of the 1990 Census undercount in Texas' colonias. But, everyone knows that the undercount was extensive.

The 1990 official census undercount of the three Texas counties with the largest colonia populations (Hidalgo, El Paso, and Cameron) was 4.1 percent, compared to 2.8 percent statewide, and 1.6 percent nationwide. *Bureau Assessment* at Attachments 4, 12. Undoubtedly, given the demography and geography of these rural settlements, the undercount in colonia areas of these counties was dramatically higher than the undercount for the counties as a whole.

The Office of the Attorney General of Texas undertook a study of colonias in Hidalgo County, Texas in 1992. The Litigation Technical Support Division located colonias in Hidalgo County relative to census block geography in order to compare the 1990 Census count of population in colonia areas with a recent comprehensive survey published by the Texas Water

Development Board ("TWDB").<sup>12</sup> The results were stunning.

The 1992 survey placed the colonia population of Hidalgo County at 109,337, but the 1990 Census Bureau enumeration of all census blocks in Hidalgo County containing colonias totaled only 84,373 -- an incredible 29.6 percent disparity. See OFFICE OF THE ATTORNEY GENERAL OF TEXAS, SOCIOECONOMIC CHARACTERISTICS OF COLONIA AREAS IN HIDALGO COUNTY: WHAT THE 1990 CENSUS SHOWS (1993). Even allowing for population growth and error in the survey, the 29.6 percent disparity is startling. Indeed, the 29.6 percent discrepancy may be higher because the official count of 84,373 was the enumerated population of all census blocks containing colonias, not just the population within colonias.

Regardless of the exact size of the 1990 undercount, these colonia populations will never be accurately counted by mail-out/mail-back questionnaires or census takers going door-to-door. To those who know these areas well, that approach would be laughable. Texas pleads that an accurate count of these populations not be nullified by political machinations over the 2000 Census plan.

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<sup>12</sup> TEXAS WATER DEVELOPMENT BOARD, WATER FOR TEXAS: WATER AND WASTEWATER NEEDS OF COLONIAS IN TEXAS (October 1992).

### III. The Undercount Robs Texans of Equal Representation and Federal Funds.

#### A. Loss of Equal Representation.

Texas, with an ever-increasing population of groups that are traditionally undercounted, is one of a small number of fast-growing states with large minority populations at risk of losing one or more congressional seats in the year 2000 if statistical sampling is not used. Because census figures are utilized by every local governmental unit in Texas and congressional seats are reapportioned by census figures, all Texans will be robbed of their constitutional right of equal representation for equal numbers of people if the undercount is not adjusted. See, e.g., U.S. CONST. art. I, § 2, cl. 3 (requiring the apportionment of congressional representation among the several states with the principle of equal representation for equal numbers of people); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969) (the purpose of redistricting is to ensure that residents enjoy equal representation in their legislatures).

#### B. Loss of Federal Funds.

The Office of the Attorney General of Texas estimated that the 1990 total undercount and differential undercount, over the decade of the nineties, will cost Texas, at a minimum,<sup>13</sup> \$1.87 billion in federal funds.

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<sup>13</sup> Undercount costs to Texas, as a result of the 1990 Census, go beyond a general estimated loss of Texas' fair share of federal funds to include costs that have never been estimated, and perhaps cannot be estimated. These costs affect all states, and arise from the misdirection of all federal spending among programs employing



This amount consists of lost federal funds for Medicaid (\$1.7 billion), AFDC (\$85.4 million), Rehabilitation Services (\$38.5 million), Social Services Block Grants (\$21.5 million), Foster Care (\$16 million), and the Federal Aid Highway Program (\$0.3 million). The loss to Texans amounts to \$107.05 per person over the course of the decade, or \$3,873.74 for each person not counted. Without an accurate statistical adjustment, Texans are facing even more severe funding losses over the next decade. Based on the Census Bureau's projected population of 20,119,000<sup>14</sup> for Texas in the year 2000, the Office of the Attorney General of Texas estimates that an undercount similar in proportion to the 1990 Census would miss 563,332 Texans and cost the state approximately \$2.18 billion in federal funds.

The loss of funds hurts all Texans because when a state is deprived of its fair share of federal funds, it is still mandated, in many instances, to provide certain services, the costs of which come out of its general revenue fund. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (under the Fourteenth Amendment, Texas has an affirmative constitutional obligation to provide children

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population-based formulas – for schools, crime prevention, health care, transportation and other purposes. For example, it is not just that Texas loses some portion of federal funds, it is also that the federal government, Texas and other states misallocate funds among programs based on the inaccurate population figures. For example, children are disproportionately undercounted, and children's programs are not properly funded as a result.

<sup>14</sup> PAUL R. CAMPBELL, U.S. BUREAU OF THE CENSUS, POPULATION DIVISION, P25-1131, POPULATION PROJECTIONS: STATES, 1995 - 2025 at 3 (1997).

of all its residents with an equal and free public education).

#### IV. The Lower Court Opinion Jeopardizes the Secretary's and the Census Bureau's Ability to Produce Adjusted Figures for the 2000 Census.

The lower court, in the critical portion of its opinion, found "that the use of statistical sampling to determine the population for purposes of the apportionment of representatives in Congress among the states violates the Census Act." Memorandum Opinion at 70. The court in analyzing the comparative dictates of 13 U.S.C. §§ 141(a)<sup>15</sup> and 195<sup>16</sup>, reasoned that: "while § 141 permits sampling techniques and surveys in the conduct of the decennial census, that general grant is subject to the more specific 'Use of Sampling' directive in § 195, which . . . explicitly proscribes the use of sampling for apportioning representatives among the states." Memorandum Opinion at 68.

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<sup>15</sup> Section 141(a) states that "[t]he Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year . . . in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary."

<sup>16</sup> Section 195 states that: "[e]xcept for the determination for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

The legal arguments and supporting authority, and there are many,<sup>17</sup> exposing the weaknesses in the lower court's opinion are presented to the Court in the briefs filed by Appellees City of Los Angeles, *et al.* Texas adopts those arguments.

Congress has appropriated sufficient funds for the Census Bureau to produce a single adjusted figure for the 2000 Census. A single set of numbers, produced with limited use of sampling, would result in the most accurate and cost effective census. It would virtually eliminate the undercount that has plagued prior censuses, and it would count almost everyone, without regard to the color of their skin or how difficult they are to enumerate. The lower court's opinion eviscerates this type of census.

Faced with a court order enjoining sampling for nonresponse follow-up and Integrated Coverage

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<sup>17</sup> For example, courts have held that, taken together §§ 141(a) and 195, evidence Congress' intention that sampling may be used in a decennial census so long as it is not a substitute for traditional methods of numeration. See, *City of New York v. U.S. Dep't Of Commerce*, 34 F.3d 1114, 1125 (2nd Cir. 1994), *rev'd on other grounds*, 517 U.S. 1 (1996) ("statistical adjustment to the initial enumeration is not barred by the Census Act and indeed was meant to be encouraged."); *Carey v. Klutznick*, 508 F. Supp 404, 415 (S.D.N.Y. 1980) ("the Census Bureau [is authorized by § 195 to] . . . utilize sampling procedures but only in addition to more traditional methods of enumeration."); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on standing*, 652 F.2d 617 (6th Cir. 1981) ("All that § 195 does is prohibit the use of figures derived solely by statistical techniques. It does not prohibit the use of statistics in addition to the more traditional measuring tools to arrive at a more accurate population count.").

Measurement, the Census Bureau would be required to pour additional funds and other resources into a less accurate traditional headcount. Under these circumstances, the Census Bureau would be forced to conduct a two-number census with one population count coming from a traditional enumeration for apportionment purposes, and another count for nonapportionment purposes based upon some revived version of the 1990 Post-Enumeration Survey ("PES").

The Census Bureau estimates that the additional costs of a traditional census, without statistical sampling, would range from \$675 million to \$800 million over and above the \$4 billion currently projected cost. *Plan for Census 2000* at 37-40. A traditional enumeration without sampling would require: following up on 100 percent of nonresponding housing units; sending enumerators to an additional 12 million nonrespondent addresses; following up on 100 percent of incomplete questionnaires; expanding partnership and promotion activities; using additional special enumeration activities; enhancing the quality assurance program; and using a PES. *Id.* After spending \$675 to \$800 million more, the Census Bureau would still deliver a less accurate census than in 1990. *Id.* at 37.

The ability of the Census Bureau to juggle two censuses -- that is, one traditional enumeration for apportionment purposes and a PES count for nonapportionment purposes -- and whether the manpower and resources to properly conduct them would be available, is questionable. Therefore, the lower court's opinion would also place the conduct of an accurate two-number census in jeopardy, and Texas, children,



minorities and other traditionally undercounted populations would be shortchanged.

### **CONCLUSION**

For the reasons stated herein, the lower court's opinion should be reversed.

Respectfully submitted,

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In The  
Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, et al.,  
*Appellants,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, et al.,  
*Appellees.*

On Direct Appeal from the United States  
District Court for the District of Columbia

BRIEF OF THE STATE OF WISCONSIN AND THE  
COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF  
APPELLEE UNITED STATES HOUSE OF REPRESENTATIVES

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BRIEF OF THE STATE OF WISCONSIN AND THE  
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INTEREST OF THE AMICI CURIAE

The Census Clause of the United States Constitution (art. I, § 2, cl. 3) commits to Congress the determination of the manner of taking the decennial census of the states' populations. The sole textual purpose of the census is the apportionment of seats in the United States House of Representatives among the states.

*Amici* are states whose representation in the national Congress is based on their own and the other states' population totals. The Executive Branch seeks to employ statistical sampling of an unprecedented nature and scale in deriving the year 2000 apportionment census. Wisconsin and Pennsylvania would have lost seats in Congress had a statistical adjustment



of the 1990 census been ordered. The States of Wisconsin and Pennsylvania believe that at a minimum the use of a statistically estimated census to apportion Representatives among the states requires congressional consideration and authorization. Because such consideration and approval have not been given, and because Congress has instead prohibited the use of sampling for the apportionment census, *amici* file this brief in support of plaintiff-appellee, the United States House of Representatives, and in support of affirmance of the district court's judgment.

### SUMMARY OF ARGUMENT

The Constitution commits to Congress the determination of the manner of taking the decennial census. The census has only one textual and one principal constitutional purpose—that of determining the states' populations for purposes of apportioning Representatives in the House of Representatives.

Terms such as "sampling" or "statistical estimation" can be misleading in suggesting a single procedural alternative to the traditional enumeration census. The reality is that questions of whether and how to conduct such a census present complex issues of policy and methodology. For the 2000 census, the Executive Branch chose not to ask Congress to resolve those issues or to authorize an estimated census. Instead, it claims the authority to employ sampling to determine the states' apportionment totals based on a strained, and ultimately implausible interpretation of the Census Act.

The district court's decision and the House of Representatives' brief address the Executive Branch's claims of statutory authorization. *Amici* believe that it is useful to recall some of the policy, methodological and constitutional issues which Congress needs to resolve before the first-ever estimated apportionment census is conducted. The mere fact that differential census coverage rates exist, as they have existed since the 1790 census, does not, of itself, mean that statistical estimation is the solution, or that any particular bundle of

estimation procedures should be adopted. The impact of census coverage differentials upon the states' population totals, and still more so upon the congressional apportionment, is complex and indirect. Notwithstanding the Census Bureau's claims that its estimation procedures are immune from political or other manipulation, the results of statistical estimation are highly sensitive to underlying modeling assumptions and methodological decisions. The interaction between this methodological sensitivity and the apportionment function means that statistical estimation has every potential to produce a malapportionment of Congress, as would have almost certainly occurred had the 1990 census estimates been adopted.

If the apportionment census is to be estimated, it must be at the direction of Congress after plenary review and debate and after sufficient safeguards have been established to ensure the impartiality, accuracy and usability of its results. What is not a constitutionally permissible course is for the Executive Branch to abrogate Congress's textual powers, claiming a wholly unrestricted authority to employ any type of sampling or survey in deriving the population totals used to apportion the House of Representatives.

### ARGUMENT

#### THE EXISTENCE OF DIFFERENTIAL CENSUS COVERAGE RATES DOES NOT JUSTIFY THE EXECUTIVE BRANCH'S PLANS TO ESTIMATE THE APPORTIONMENT CENSUS ABSENT CONGRESSIONAL AUTHORIZATION.

Both the Government and the defendants-appellees rely on a reading of the Census Act as authorizing the unrestrained use of sampling in the taking of the apportionment census. As we understand the statutory interpretation being offered, Congress is claimed to have granted the Secretary of Commerce discretion to use "sampling procedures and special surveys," 13 U.S.C. § 141(a), in conducting the apportionment census, without placing a single limit, other than the census date, on

the exercise of that discretion. The statutory authorization of sampling as part of the decennial census is identical to the authority granted for the mid-decade census. Cf. 13 U.S.C. § 141(a) and (d). Accordingly, under this view, Congress has not merely granted the Secretary of Commerce the authority to carry out the Census Bureau's current plans to estimate the year 2000 census, but has authorized the apportionment census to be taken through a sample of one in every six households or less.<sup>1</sup>

The arguments for this authority to use sampling are not so much that it was granted by design, but as an artifact of the Act's amendments between 1957 and 1976. Nevertheless, both the Government and the defendants-appellees suggest that Congress actually intended to give the Secretary of Commerce such unbridled discretion as the mere continuation of a historical trend of delegating census taking to the Census Bureau. Much of the Government's and the defendants-appellees' discussion of the problems inherent in counting a large, mobile and heterogeneous population appears offered as a substitute for congressional findings that were never made stating such intent.

*Amici* agree that declining census participation is a matter of serious concern, as is the persistence of census coverage differentials for different population groups. Both problems reflect broader trends of disengagement from the

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<sup>1</sup>The Census Bureau's plans for the 2000 census differ from a one-in-six sample in degree but not in kind. Previous proposals to estimate the census involved deriving statistical estimates to adjust the results of an attempted complete enumeration. In contrast, the Bureau's plans for the 2000 census are to attempt direct contact of only 90% of each census tract's households following the initial mail-out phase. See Commerce Dept. Br. at 8 n.5; J.A. 88-91. The Bureau's estimation plans cannot, therefore, be said to employ "sampling techniques to enhance the accuracy of the count after good-faith efforts to contact all residents directly . . . ." Commerce Dept. Br. at 36 n.19.

process of self-government and, in the case of lower minority participation, a legacy of exclusion from that process.

Statistical estimation as a solution implies reliance on some type of sampling as the basis for deriving adjustments to an initial whole or partial count, obtained through more traditional canvassing methods. A decision actually to estimate the census poses multiple issues of policy and methodology at various levels of generality and specificity.

A general issue raised by statistical estimation is that it substitutes the methods and manipulations of experts for individual participation. As such, estimation acquiesces in broader trends of non-involvement in civic and social life. These trends are themselves an important cause of reduced census participation. See J.A. 51. A concrete example of estimation's disincentive to voluntary census participation is that during the mail-back phase of the 1990 census, Wisconsin residents achieved the highest return rate in the nation, an accomplishment that was formally recognized by the Census Bureau. See *Wisconsin v. City of New York*, Nos. 94-1614, 94-1631, 94-1985 (U.S.S.Ct.), Jt. Appendix 95-101. Under the estimates proposed at the time, Wisconsin's reward for these efforts would have been the loss of a seat in Congress and millions of dollars per year in federal funding.

Some estimation methodologies pose significant questions of constitutionality, over and above the general issue of whether an estimated census is ever permitted. For example, the Census Bureau's 1990 estimates of the states' populations were based on multi-state samples. See *Wisconsin v. City of New York*, 517 U.S. 1, 22 (1996). A significant question existed as to whether this procedure comported with the Fourteenth Amendment's textual requirement that Congress be apportioned based the states' populations, "counting the whole number of persons in each state . . . ." U.S. Const. amend. XIV, § 2. As noted *supra* footnote 1, previous proposals to use sampling to adjust the census would have done so only after an attempted full count. In contrast, the Executive Branch's plans



for the 2000 census are deliberately to stop counting when 90% of the population is believed to have responded and to estimate the remainder. Whether or not sampling to correct an attempted full enumeration would be constitutionally permissible, granting permission to a procedure which combines statistical estimation with deliberate undercounting would reduce the constitutional text to a mere requirement that some type of population estimate be derived every ten years.

Whatever the theoretical support for statistical estimation as a solution to census coverage problems, statistical projects of this scale, executed under relatively tight time constraints, are subject to unanticipated problems and errors. During the 1990 census, errors in the Census Bureau's June 1991 estimates, which were not discovered until well after Secretary Mosbacher's decision not to adjust the enumeration totals, were found to account for roughly one-fourth of the estimated 2.1% national undercount. See Decision of the Director of the Bureau of the Census on Whether to Use Information From the 1990 Post-Enumeration Survey (PES) To Adjust the Base for the Intercensal Population Estimates Produced by the Bureau of the Census, 58 Fed. Reg. 69 (1993); see also J.A. 437 (reporting national undercount estimate of 2.08% in June 1991 and 1.58% in July 1992). Had the adjusted totals been substituted for the official count, these undiscovered errors would have caused an erroneous shift of a seat in the House of Representatives from Pennsylvania to Arizona.

As part of the statistical analysis of the 1990 census estimates, reasonable modifications in the estimation procedure produced five different congressional apportionments, affecting the representation of eleven different states. Decision of The Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population, 56 Fed. Reg. 33582, 33601 (1991). The Census Bureau itself reported three sets of state population estimates in April 1991, each of which would have resulted in a different apportionment. The Census Bureau's

claims that estimation no longer poses a risk of political manipulation relies heavily on the professionalism of the Census Bureau and the specific design of the 2000 census. See J.A. at 128-32.<sup>2</sup> But even if the sensitivity of congressional apportionment to estimation methodologies and the ability to know these impacts in advance does not render estimation vulnerable to political manipulation, cf. *City of New York*, 517 U.S. at 11-12, a method that produces multiple apportionments depending on its modeling assumptions provides weak assurance that the apportionment selected will be the correct one. And if the Census Bureau's professionalism provides sufficient safeguard against manipulation, it remains implausible that Congress would accept that risk without so much as considering the imposition of pre-specification standards.

At the same time, *amici* question whether the benefits of estimation are as great as claimed, particularly with respect to the census's textual constitutional function of providing the population totals for apportioning Representatives among the states. The "devastating" effects of not estimating the census identified in the Los Angeles defendants' brief are non-constitutional or at least non-textually constitutional. These are the loss of federal aid under distribution formulas that rely on census data and distortions in intrastate districting. See *Los Angeles Br.* at 6-8. The Census Bureau's description of the effects of inaccuracy in the 1990 census consists of the non-specific statement that "[a]s a result of the inaccuracy in the 1990 Census, many Americans were denied an equal voice in their government. Federal spending employing population-

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<sup>2</sup>Nevertheless, Wisconsin finds it difficult to regard the Bureau's choice of Milwaukee's Complete Count Campaign to assess the benefits and limitations of census outreach programs as mere happenstance. Nor do we understand the Bureau's stating that by 1990 the mail-back return rate had fallen to sixty-five percent, when describing declining census participation, J.A. 52, while simultaneously reporting a seventy-four percent national rate when contrasting Milwaukee's voluntary return rate of seventy-six percent. J.A. 113.

based formulas—for schools, crime prevention, health care, and transportation—was misdirected." J.A. 49.

Efforts to estimate the 1990 count revealed the indirect and complex relation between the differential undercount and the apportionment of the House of Representatives. The term, "differential undercount," tends to mask the diverse texture of census coverage patterns, both within and between states. Every state has renters and home owners, children and adults, rural and urban dwellers, minority and non-minority residents. Some states will have relatively more of one group than another. For example, in 1990, states in the Midwest and Northeast tended to have more African-American residents (as a percentage of total population) than states in the West, but fewer Native Americans and residents of Hispanic origin. See U.S. Department of Commerce Bureau of the Census, *1990 Census of Population: Summary Population and Housing Characteristics*, United States Summary (1992), Table 2. Representatives in Congress are apportioned to states, not to demographic groups. In general, but only in general, a state with more non-white and Hispanic residents (as a percentage of the total population) is likely to see an increase in its relative share of the national population as a result of statistical estimation than a state with fewer non-white and Hispanic residents. But the extreme generality of this result cannot be overstated. In 1990, every state in the Northeast and Midwest—states as diverse demographically as New York and New Hampshire, New Jersey and Iowa—was reported as having an undercount below the national average, meaning that a statistical adjustment would have resulted in every one of these states losing population as a percentage of the national total. And while New Mexico asserts that it "suffered the largest percentage undercount of any State" in 1990, see *Los Angeles Br.* at 5, it does not claim, and it was not the case, that "correcting" for the state's estimated undercount made any difference to its congressional apportionment.

When a claim that the Constitution required statistical estimation of the census was before this Court three years ago, the Government recognized that distributional accuracy was the type of accuracy that mattered principally to the census's constitutional purpose. See *City of New York*, 517 U.S. at 20. The Census Bureau's assurances that an estimated 2000 census will be more accurate numerically than conventional enumeration, see J.A. at 121-23, are therefore less than convincing to states concerned with the correctness of the apportionment.

The Framers of the Constitution believed Congress should be entrusted with deciding the best way of determining the populations of the states, used to allocate their political representation in the national government. If the census is to be estimated, it can only be after Congress has addressed these and similar issues, had established protections to ensure that the estimates will be both fair and accurate and has expressed plain approval for the practice. As with the decision to establish a self-executing apportionment, it is only through congressional authorization that statistical estimation may come to resolve "the potentially divisive and complex issues associated with" the taking of the decennial census. Cf. *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 465 (1992). The parallels between the controversy surrounding apportionment methods and the controversy surrounding census methods are not coincidence. Where the similarity ends is that in this case, the Executive Branch seeks to bypass Congress's consideration of the studies it has commissioned and its reliance on the "decades of experience, experimentation, and debate," *id.*, that have come to surround the issue of census estimation. *Amici* submit that issues as important as these, bearing on the states' representation in the national government and on voluntary participation in this single duty of national residence, are not resolved through implausible manipulations of the Census Act and its legislative history.



## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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**Nos. 98-404 and 98-564**

**IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1998**

**UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,**  
*Appellants,*  
**v.**  
**UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,**  
*Appellees.*

**On Appeal From the United States District Court  
For the District of Columbia**

**WILLIAM J. CLINTON, ET AL.,**  
*Appellants,*  
**v.**  
**MATTHEW GLAVIN, ET AL.,**  
*Appellees.*

**On Appeal From the United States District Court  
For the Eastern District of Virginia**

**AMICUS CURIAE BRIEF OF NATIONAL CITIZENS LEGAL  
NETWORK, U.S. BORDER CONTROL, LINCOLN INSTITUTE  
FOR RESEARCH AND EDUCATION, ENGLISH FIRST  
FOUNDATION, AND POLICY ANALYSIS CENTER  
IN SUPPORT OF APPELLEES**

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## INTEREST OF THE AMICI CURIAE

*Amici curiae*, National Citizens Legal Network, a project of Citizens United Foundation, U.S. Border Control, Lincoln Institute for Research and Education, English First Foundation, and Policy Analysis Center, are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.<sup>1</sup> Each of the *amici* was separately established in the District of Columbia or the Commonwealth of Virginia within the past twenty years for purposes related to participation in the public policy process. For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, each of the *amici* has conducted research on other issues involving constitutional interpretation, and several have filed *amicus curiae* briefs in other federal litigation involving constitutional issues, including briefs before this Court.<sup>2</sup>

This brief is intended to assist the Court in fully developing the issues in the matters now before this Court. Hopefully, the perspective of nonprofit educational organizations, including

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief. Such written consents, in the form of letters from counsel of record for the various parties, have been received and submitted to the Clerk of Court for filing. See Supreme Court Rule 37.3(a).



these *amici curiae*, will assist this Court in obtaining a better understanding of the ramifications of this legal dispute.

The two cases now before this Court concern the authority of the appellants, who include the President and the U.S. Department of Commerce, to use statistical sampling in the next United States decennial census ("the 2000 Census") as a partial substitution for an actual enumeration of the population. These *amici*, particularly because of their interest in the integrity of constitutional processes, are deeply concerned about appellants' plan to substitute statistical sampling techniques for an actual enumeration in the 2000 Census to determine the population of the states for apportionment purposes, believing that appellants' plan would violate not only the Census Act, but the Constitution as well.

### SUMMARY OF ARGUMENT

Two three-judge panels of separate United States district courts have concluded, in unanimous opinions, that appellants' proposed use of sampling techniques in the 2000 Census to estimate the population for purposes of apportionment is illegal. Both opinions found that the Census Act (at 13 U.S.C. Sec. 195) proscribes the use of sampling to determine the population for decennial apportionment. The decisions of the courts below are correct and should be affirmed.

The district courts did not find it necessary to reach the question of whether, under the Constitution, Congress may authorize the Secretary to use sampling to determine state populations for purposes of apportionment. If this Court should reach that question, the Constitution (*see* Art. I, Sec. 2, Cl. 3, and Sec. 2 of the Fourteenth Amendment) provides the

clear, unambiguous answer: the census must be an "actual enumeration," and the process must be one of "counting the whole number of persons in each state."

Appellants' invitation to disregard the plain meaning of the Constitution's precise language should be rejected. Review of the historical record supports the fact that "actual enumeration" as used in Art. I, Sec. 2, Cl. 3, was intended to have its plain meaning. The Framers of the Constitution foresaw the concern that would be raised by appellants' census plan: the danger of politically manipulated apportionment. The Framers were aware that an actual enumeration — an actual "headcount" — was necessary to guarantee the representative nature of the lower house of Congress, whose membership would be distributed by state according to population. They wisely mandated a census by actual enumeration, refusing to leave the matter to the discretion of executive officials or legislators.

Current events show that the risk of manipulation is real. Investigations and reports by committees of the 105<sup>th</sup> Congress underscore concerns regarding the deeply politicized agency which supervises the administration of the census — the Commerce Department. A census by actual enumeration is necessary to preserve public confidence in the integrity of the House of Representatives as well as to guard against the appearance of political corruption.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF THE CENSUS ACT PROHIBITS SAMPLING FOR PURPOSES OF APPORTIONMENT

Three-judge panels of two federal district courts each ruled unanimously that the plain language of Sections 141 and 195 of the Census Act prohibits the Secretary of Commerce from employing sampling methods to determine state population totals for purposes of apportioning seats in the U.S. House of Representatives. See United States House of Representatives v. United States Dept. of Commerce, C.A. No. 98-0456 (D.D.C., Aug. 24, 1998) (“House v. Commerce”), J.S. App. 1a-67a (No. 98-404); Glavin v. Clinton, C.A. No. 98-207-A (E.D. Va., Sept. 24, 1998), J.S. App. 1a-22a (No. 98-564). The district courts’ holdings should be affirmed.

Although sampling may be used to gather certain information during the decennial census, the Census Act expressly prohibits sampling “for the determination of population for purposes of apportionment of Representatives in Congress among the several States....” 13 U.S.C. Sec. 195. For purposes other than apportionment, Section 195 requires the use of sampling if the Secretary of Commerce “considers it feasible.”<sup>3</sup> Section 141 likewise permits, at the Secretary’s discretion, the use of sampling procedures and special surveys

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<sup>3</sup> Since the requirement to use sampling for nonapportionment purposes hinges upon the Secretary’s determination that such sampling is “feasible,” Sec. 195 can be said to authorize such sampling at the Secretary’s discretion. See fn. 6, *infra*, and accompanying text.

as part of the decennial census — although, as the court stated in House v. Commerce, in the case of apportionment, the general authorization gives way to the express prohibition of Sec. 195. J.S. App. at 60a-67a. See also opinion of the court in Glavin v. Clinton, J.S. App. at 18a-22a.

Appellants read the first clause of Sec. 195 (“Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States...”) as an exception to a “mandatory directive” (“the Secretary shall, if he considers it feasible, authorize [sampling].”). Appellants argue that “[n]o rule of statutory construction suggests...that activities specifically excepted from a mandatory directive are thereby prohibited.” *Aplt. Brief*, pp. 28-29.<sup>4</sup> Citing several examples of what they term the “except/shall formulation,” appellants state that the exception from a mandatory directive does not constitute a prohibition in any of them. *Id.*, n. 15. Appellants contend, therefore, that the general permission to sample under Sec. 141 governs, granting the Secretary authority to use sampling for all purposes, including apportionment. *Id.*, p. 29. The effect of the two sections of the statute, according to appellants, is to allow the Secretary to use sampling for apportionment purposes at his discretion.

Under this strained reading of Sec. 195, the exception to the general authorization to use sampling would be wholly negated, since the Secretary could employ sampling both for nonapportionment purposes “if he considers it feasible” and, again at his discretion, for apportionment purposes. Such a

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<sup>4</sup> “*Aplt. Brief*” refers to the brief for appellants filed by the Solicitor General of the United States with this Court in Docket No. 98-404.



reading would render the exception in Section 195 devoid of meaning. Statutes must be read so that every word has some operative effect, so as to avoid "emasculating" a Congressional enactment. See Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154, 1166 (1997); United States v. Menasche, 348 U.S. 528, 538-39 (1955).<sup>5</sup>

Contrary to appellants' reading of Sec. 195, the second clause of Sec. 195 is not a "mandatory directive." It directs the Secretary of Commerce to authorize the use of sampling "if he considers it feasible." The Secretary therefore has discretion to employ sampling (dependant on whether he considers sampling feasible) "except...for purposes of apportionment." Appellants' analysis of the second clause of Sec. 195 as a "mandatory directive" might have been closer to the plain meaning of the statute if Sec. 195 omitted entirely all references both to feasibility and to the Secretary's judgment (*i.e.*, sampling must be employed in all situations).<sup>6</sup> As it

<sup>5</sup> Prior to the enactment of the current language of Sec. 195 in 1976, Sec. 195 stated "Except...for apportionment purposes, the Secretary may, where he deems it appropriate [employ sampling]." The 1976 amendment, therefore, at most emphasized the Congressional authorization to use sampling for purposes other than apportionment. As the District Court stated in House v. Commerce, Congress would not have employed such an oblique method to allow sampling for apportionment purposes. *Id.*, p. 67; J.S. App. at 60a-61a. Also, the amendment clarified the exception to the general authority to employ sampling by making it more specific, since after 1976 the exception applied to "apportionment of Representatives in Congress among the several States," and not merely to "apportionment."

<sup>6</sup> Even if considered a mandatory directive, as the District Court for the Eastern District of Virginia pointed out, an exception to a mandatory

stands, however, Sec. 195 permits the use of sampling at the Secretary's discretion, except for "the determination of population for purposes of apportionment of Representatives in Congress among the several States."

The Administration's plan therefore violates the Census Act by requiring the illegal use of statistical estimation methods to determine population counts for purposes of apportionment.

## II. THE PLAIN LANGUAGE OF THE CONSTITUTION REQUIRES AN ACTUAL ENUMERATION FOR PURPOSES OF APPORTIONMENT

The courts below did not reach the constitutional question. Thus, if this Court affirms the determination of either court regarding the Census Act, resolution of the constitutional question is not necessary. If, however, this Court should reach the constitutional question, the answer is certain: the population of the United States in the decennial census, for purposes of apportionment, must be actually enumerated, not merely estimated.

### A. The Constitutional Language Must Be Given Its Normal and Intended Meaning

Art. I, Sec. 2, Cl. 3 of the Constitution requires Congress to enact a law requiring a decennial census be conducted to determine the number of representatives to be elected to the

directive can, and often does, constitute a prohibition of the excepted activity. See Glavin v. Clinton, Sl. Op., p. 26.

House of Representatives from each state. Additionally, that Clause, as modified by Sec. 2 of the Fourteenth Amendment, requires that the law enacted by Congress provide for the "actual enumeration" of the American populace by "counting the whole number of persons in each State, excluding Indians not taxed."

Appellants argue that the Constitution does not require an actual headcount of the American people, but merely an estimate of the number of people in each state. *Aplt. Brief*, pp. 39-49. To support this contention, appellants have ignored key words contained in both Art. I, Sec. 2, Cl. 3, and in Sec. 2 of the Fourteenth Amendment. *Aplt. Brief*, pp. 40-41. Additionally, they have lifted out of context other words, claiming that the only constitutional requirement is that a census be taken to "further the goal of equal representation for equal numbers of people." *See id.*, p. 46, n. 28.

The language of the relevant constitutional provisions, however, is not susceptible of such a strained interpretation. Because Art. I, Sec. 2, Cl. 3 requires Congress to enact a law providing for a census by "actual enumeration," Congress is not free to legislate to provide for a census count by any method of its own choosing. And because Sec. 2 of the Fourteenth Amendment contains a parallel call for a "counting of the whole number of persons in each State," Congress cannot by law direct a census to count some of the persons in each state and "estimate" the number of those not counted. In short, the plain meaning of the constitutional text denies to both the Congress and the Executive Branch the authority to employ statistical methods to calculate the population of each state for purposes of apportionment.

## B. The Plain Meaning Doctrine Governs

From the earliest days of the Republic, this Court has observed the principle that the "words of the constitution are to be taken in their obvious sense." Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 618 (1895). As Chief Justice Marshall stated in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824), "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." Sixty-five years later, Justice Lucius Q. C. Lamar elaborated upon this rule for a unanimous Court. Justice Lamar wrote:

Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such a case there is the well settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of the framers, and of the people adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for meaning beyond the instrument. [The Board of County Commissioners v. Rollins, 130 U.S. 662, 670 (1889).]



More recently, this Court applied the plain meaning rule in a case of first impression. Federal District Judge Walter L. Nixon sought review of his conviction by the United States Senate on charges of impeachment, claiming that he had not been given a "judicial trial" before the full Senate, as required by Art. I, Sec. 3 (which provides that "[t]he Senate shall have sole Power to try all Impeachments"). Nixon v. United States, 506 U.S. 224, 229 (1993). This Court refused to accept Mr. Nixon's effort to impose a technical meaning upon the word "try," noting that the dictionary gives it "considerably broader meanings than those to which petitioner would limit it." *Id.* In addition to ascribing a common sense meaning to "try," this Court observed that the Constitution had granted to the Senate the "sole" power to examine impeachment charges. Again, this Court chose the "common sense meaning" of the word "sole," concluding "that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted." *Id.*, 506 U.S. 230-31.

Having followed in the Nixon case "the well established rule that the plain language of the enacted text is the best indicator" of the meaning of a particular constitutional provision, *id.*, 506 U.S. at 232, this Court demonstrated the continuing vitality of the traditional rule that the meaning of a constitutional text is determined by "the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them." The Board of County Commissioners v. Rollins, *supra*, 130 U.S. at 670. As Justice Lamar explained in the Rollins case:

If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning,

apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. [*Id.*]

The question here is whether the words used in the Constitution that govern the conduct of the decennial census "convey a definite meaning" and, if so, if that meaning is consistent with or contrary to other parts of the document.

### 1. The Plain Meaning Doctrine Applies to the Constitutional Text Mandating a Decennial Census

Art. I, Sec. 2, Cl. 3 of the Constitution utilizes ordinary language to describe how the decennial census is to be conducted: "The actual Enumeration shall be made...within every...Term of ten years." Sec. 2 of the Fourteenth Amendment likewise uses ordinary language to describe the means by which the decennial census is to occur: "counting the whole number of persons in each State, excluding Indians not taxed." The operative words, "actual Enumeration" and "counting," are not words of art, nor are they imbued with special historic meaning like "due process of law." Rather, they are practical prescriptions understood by all, directing how the task of numbering the people for apportionment is to be accomplished.

On pages 40 and 41 of their brief, appellants set forth their claim that "the text of the census clause does not require the use of any particular method to determine the populations of the several states." In addressing the meaning of the constitutional language, however, appellants have neglected to

define two key words found in the relevant texts. First, in their attempt to ascertain the meaning of "enumeration," appellants made no effort whatsoever to ascertain the ordinary meaning of the word "actual," even though the constitutional text calls for an "actual enumeration." Second, appellants made absolutely no effort to determine whether the text of Sec. 2 of the Fourteenth Amendment contributes to an understanding of the meaning of "actual enumeration," even though that text explicitly addresses the way that the decennial census is to be conducted, requiring, *inter alia*, the "counting of the whole number of persons in each State."<sup>7</sup>

Had appellants addressed the word "actual," they would have had to concede that the enumeration must be "real," not "virtual" or "potential." At the time of the Convention, "actual" meant "really in act." Samuel Johnson, A Dictionary of the English Language (4<sup>th</sup> Ed., 1773). Had appellants acknowledged the existence of "counting" in the Fourteenth Amendment, they would have had to admit that the census mandated by the constitution had to be conducted by naming the people "one by one, or by small numbers, for ascertaining the whole," not by estimating the whole "without measuring or

<sup>7</sup> In their brief supporting appellants in No. 98-564, appellees City of Los Angeles, *et al.*, argue that the "records of the debates" surrounding passage of the Fourteenth Amendment do not support the idea that the Framers of Sec. 2 of that Amendment "were exclusively committed to conducting the census through the use of a head count." L.A. Brief, No. 98-564, p. 6. This argument — which apparently rests on the fact that the primary purpose of Sec. 2 was to adjust apportionment — is not only unpersuasive, it totally ignores the fact that the plain meaning of the Fourteenth Amendment, like the plain meaning of Art. I, Sec. 2, Cl. 3 of the Constitution, requires a head count.

weighing" each component. Noah Webster, American Dictionary of the English Language (1828). Having failed to address these ordinary meanings of "actual" and "counting," appellants' proposed definition of enumeration is fatally flawed.

Compounding this error, appellants sought to define "enumeration" using a modern dictionary as their primary reference. This departs from the practice of this Court to ascertain the meaning of the ordinary language in the Constitution by primary reference to a dictionary in use at the time of the Constitutional Convention. See Nixon v. United States, 506 U.S. 224, 229-30 (1993). Had appellants followed this practice, they would have seen that to "enumerate" was "to reckon up singly" or "count over distinctly." Samuel Johnson, *supra*.

The plain meaning of "actual," "enumeration," and "counting" is further confirmed upon examination of the other constitutional provisions which use the same or similar words. The word "actual" appears in two other provisions. According to Art. II, Sec. 2, Cl. 1, the President is commander in chief of a state militia only when it is "called into the **actual**" service of the United States. (Emphasis added.) According to the Fifth Amendment, a member of a state militia is not entitled to the protection of the grand jury indictment guarantee **only** when the militia is "in **actual** service in time of War or public danger." (Emphasis added.) In both instances, this Court has — from the beginning — insisted that these provisions apply only when a state militia has **really entered** into the service of the United States, not just been organized and readied to enter that service. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16-20, 60-64 (1820); Johnson v. Sayre, 158



U.S. 109, 114-15 (1895). As Justice Story stated, it is one thing for the Congress to "call forth the Militia" into the service of the United States; it is quite another to actually enter into that service. Houston, *supra*, 18 U.S. at 64.

The word "enumeration" also appears more than once in the Constitution. The Ninth Amendment states that "[t]he enumeration in the Constitution, of certain rights, shall not be constructed to deny or disparage others retained by the people." (Emphasis added.) While the identity of the "unenumerated" rights referred to in this Amendment have been vigorously disputed, there is no debate that the "enumeration" of rights referred to in the Amendment refer to the actual rights that are "specifically mentioned" in the constitutional text. See Griswold v. Connecticut, 381 U.S. 479, 488-93, 519-27 (1965).<sup>8</sup>

While the word "counting" does not appear elsewhere in the Constitution, the word "counted" appears in the provisions addressing how the votes for President and Vice-President are to be ascertained in the Electoral College. See Art. II, Sec. 1, Cl. 3. See also the Twelfth Amendment. Can there be any

<sup>8</sup> Relying on the language of Art. I, Sec. 9, Cl. 4, which states that "[n]o direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken," appellants say that "the Framers understood the word 'enumeration' to be synonymous with 'census of population,' and then claim that the requirement that an 'enumeration' be conducted does not dictate the use of any particular methodology in determining the total population of each State." *Aplt. Brief*, p. 41, n. 23. That contention is wrong, and also ignores the fact that the reference to "census or enumeration" in Art. I, Sec. 9, Cl. 4 expressly refers back to the "actual Enumeration" "herein before" required by Art. I, Sec. 2, Cl. 3, not to an enumeration generally.

doubt that such votes are to be reckoned one by one and not estimated by some formula (*e.g.*, based upon an estimated "undercount" of votes cast)? Indeed, this Court has stated that "all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted,'" that "[e]very voter's vote is entitled to be counted once," and that "[i]t must be correctly counted and reported." Gray v. Saunders, 372 U.S. 368, 380 (1963).

If "counted," in relation to an elector's vote in the electoral college, means individually computed, then surely "counting the whole number of persons in each State" in the decennial census must mean individually ascertaining that whole number. If "enumeration" in relation to the Constitution means individual specification in the written text, then "enumeration" in relation to the decennial census must likewise require individual treatment. And if "actual" in relation to the state militia's federal service requires proof of entrance into the service in fact, then "actual" in relation to the decennial census must also deal with facts, not estimates.

Only when the Constitution's terms are construed in their "natural signification" does it function harmoniously as a whole. Indeed, by attribution of identical meanings to these words throughout the constitutional text, the "simplest and most obvious interpretation" of the document is embraced — which "is the most likely to be that meant by the people in its adoption." The Board of County Commissioners v. Rollins, *supra*, 130 U.S. at 671.

## 2. The Plain Meaning Doctrine Limits the Conduct of the Decennial Census

According to Art. I, Sec. 2, Cl. 3, the first "actual Enumeration" of the people and every subsequent enumeration was to be conducted "in such Manner as they (Congress) shall by Law direct." By limiting Congress to prescribe only the "Manner" by which the "actual Enumeration" was to be accomplished, the Constitution limited the power of Congress to enact only such legislation that is designed to provide for an "actual enumeration" of the population. This limitation upon Congressional power has been reinforced by the prescription contained in Sec. 2 of the Fourteenth Amendment that the census "[count] the whole number of persons in each State, excluding Indians not taxed." For, as this Court has ruled recently, the power of the Congress in relation to the substantive provisions of the Fourteenth Amendment is "remedial," limited to the enforcement of those provisions as written. *City of Boerne v. Flores*, 521 U.S. \_\_\_, 138 L.Ed. 2d 624, 636-44 (1997).

Not surprisingly, Congress has invariably provided for actual enumeration of the people, reflecting the plain meaning of the constitutional text. See *Franklin v. Massachusetts*, 505 U.S. 788, 803-06 (1992); *United States Dept. of Commerce v. Montana*, 503 U.S. 442, 448-56 (1990).

### C. The Appellants' Argument Ignoring the Plain Meaning of the Constitutional Text Is Spurious

Appellants ask this Court to disregard the plain meaning of the census provisions of Art. I, Sec. 2, Cl. 3 and Sec. 2 of the Fourteenth Amendment in favor of permitting the decennial

census to be conducted by any means so long as it "furthers the goal of equal representation for equal numbers of people." *Aplt. Brief*, p. 46, n. 28. In support of this startling proposition, appellants note that the phrase "actual enumeration" was placed in Art. I, Sec. 2, Cl. 3 by the Committee of Style and Arrangement — after the Convention had approved of an earlier version that stated simply that the decennial census "be taken in such manner as the said Legislature shall direct." Because there is no record that the Convention ever considered whether the insertion of "actual enumeration" was calculated to limit such legislative power, appellants have urged that the phrase must not have been designed to impose any limitation on Congress's authority to direct the census however it sees fit, but only "to distinguish the permanent basis for apportioning Representatives from the temporary allocation set forth in the Census Clause." *Aplt. Brief*, pp. 43-46.

Appellants' argument is clever, but spurious, resting upon the proposition — rejected by this Court — that a constitutional text should be read not according to its final adopted form, but according to an earlier draft. In launching this subterranean attack upon the constitutional text, appellants have misapplied the rules of textual interpretation adopted and followed by this Court.

In footnote 25 on page 44 of their brief, appellants assert that this Court's opinion in *Nixon v. United States*, *supra*, 506 U.S. at 231, stands for the proposition that words added by the Committee of Style must be construed so as to conform to an earlier draft of the Constitution because "the Committee of Style had no authority from the Convention to alter the



meaning' of the draft Constitution submitted for its review and revision."

In *Nixon*, this Court rejected this very proposition. Mr. Nixon claimed that the word "sole" as it appears in Art. I, Sec. 3, Cl. 6 has "no substantive meaning" because "the word is nothing more than a 'cosmetic edit' added by the Committee of Style after the delegates had approved the substance of the Impeachment Trial Clause." This Court rejected Mr. Nixon's approach, relying on the presumption that when the Committee of Style added "sole" to the text, it "captured what the Framers meant in their unadorned language." Further, this Court concluded that the Committee must have done its job because the "Constitutional Convention voted on, and accepted, the Committee of Style's linguistic variation." This Court concluded that "sole" — the word added by that Committee — "was entitled to no less weight than any other word of the text." To have concluded otherwise, the Court observed, would elevate the "second to last draft" of the constitutional text above the final version, which would violate "the well established rule that the plain language of the enacted text is the best indicator of intent." 506 U.S. at 231-32.<sup>9</sup>

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<sup>9</sup> If, as appellants maintain, "actual enumeration" should be disregarded in favor of the earlier draft, then so should the phrase "by Law." Both phrases were added by the Committee of Style, without any record that either was addressed specifically by the full Convention. If the census is to be conducted "in such manner as the **Legislature shall direct**" (emphasis added), then according to appellants' construction of Art. I, Sec. 2, Cl. 3, the 2000 Census must be carried out as Congress directs. As appellants acknowledge (Aplt. Brief, p. 5), in 1997 Congress passed a bill which directed that the census not be conducted by "sampling or any other statistical procedure," only to

*Nixon's* plain meaning rule does not support appellants' denigration of "actual enumeration" to a merely descriptive, transitional term. See Aplt. Brief, p. 45. To the contrary, "actual enumeration" is best understood as a normative term which differentiates between the apportionment of representatives in the first House of Representatives from the apportionment method to be followed thereafter. Further, the term's plain meaning is reinforced by the historical context.

As appellants acknowledge, the initial apportionment of representatives provided for in the Constitution was based, in part, on estimates of future population growth and other non-population factors. Aplt. Brief, p. 45, n. 26. While such an expedient method of apportionment was applied at the beginning, this method was not to be repeated in the future. Instead, within three years after the first meeting of Congress, the Constitution required an "actual enumeration" of the people of each state so that the composition of the House reflected the proportion of the actual population of the states.

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have the bill vetoed by the President. Without the "by Law" limit imposed on Congress by the existing constitutional text, there would have been no need to present a bill for Presidential approval or veto: if it had exclusive and non-reviewable authority, Congress could have issued a directive (e.g., by joint resolution) expressly prohibiting the Commerce Department from using "sampling or any other statistical procedure" for purposes of apportionment. Thus, under the appellants' construction of Art. I, Sec. 2, Cl. 3, the will of the 105<sup>th</sup> Congress (as evidenced by the 1997 bill) that there be no sampling for purposes of apportionment in the 2000 Census would be legally and constitutionally binding

Given that the composition of the first House was based upon estimates, to be changed as soon as the constitutionally-required census was conducted, it is clear that the "actual enumeration" language was designed to obtain a census based upon an actual count of actual people, not another estimate. See J. Madison, *Notes of Debates in the Federal Convention*, pp. 267-68 (Norton: 1987 ed.) (hereinafter "*Madison's Notes*").

**D. Appellants' Version of the Underlying Purposes of Article I, Section 2 Must Give Way to the Plain Meaning of the Constitutional Text**

Appellants say that the meaning of "actual enumeration" should be determined by "the purposes underlying Article I, Section 2." In ascertaining those purposes, however, appellants reach beyond the constitutional text, asserting that the "fundamental goal" of the decennial census is to secure "equal representation for equal numbers of people for the House of Representatives." Having extrapolated this singular purpose as the objective of the census, appellants claim that the Constitution should not be read to bar any "census-taking technique..." that "would produce more accurate population figures" than an actual headcount. Aplt. Brief, pp. 46-47.

Appellants' extrapolation is just another example of their disregard for the plain meaning doctrine of this Court. The constitutional purpose of the decennial census is not, as appellants have contended simplistically, to secure "equal representation for equal numbers of people." Rather, as Article I, Section 2 states, the purpose of the census is to ensure that the House of Representatives be chosen "by the people of the several States...according to their respective

Numbers...among the several States." Thus, the goal of the decennial census is to enumerate the actual numbers of residents of each state so that each state would be on an equal footing in relation to its inhabitants. See *Madison's Notes*, pp. 267-68.

To secure this goal, the Convention not only mandated a "periodical census," it dictated a methodology for that census, tying the hands of Congress so "that they could not sacrifice their trust to momentary considerations. See *id.* at 268. The methodology required a permanent standard, a fixed rule not left to the discretion of the legislature.

The purpose of the words "actual enumeration" is to fix the fundamental process of executing the decennial census so that the numbers cannot be manipulated to evade the constitutional objective of equal representation in proportion to the actual residents of each state. When examined in light of the constitutional purpose of the census, an actual enumeration best fulfills that purpose. Whenever government officials depart from the plain meaning of a constitutional text in order to achieve some "higher goal" — as appellants seek to do in this case — then, in the end, "the Constitution...is in danger of being rendered a mere dead letter...." *The Board of County Commissioners v. Rollins*, *supra*, 130 U.S. at 671. The plain meaning rule was fashioned in order to avoid this danger:

Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation. [*Id.*]



### III. THE CONSTITUTIONAL INTEGRITY OF THE REPUBLIC REQUIRES APPORTIONMENT BY AN ACTUAL ENUMERATION OF THE PEOPLE, NOT BY A STATISTICAL ESTIMATE OF THE POPULATION

#### A. An Actual Enumeration for Apportionment Is Essential to Protect the Representative Nature of the House of Representatives

One of the most extensively debated issues at the Constitutional Convention was how to insure that the House of Representatives achieved an "equitable ratio of representation" between the several states. At first, the debate focused on whether Congress should have discretion to "take a periodical census for the purpose of redressing inequalities in the Representation..." *Madison's Notes*, pp. 266-67, 271-72. Those who favored a constitutional mandate for a periodic census ultimately prevailed, persuading their fellow delegates that it was in "the nature of man...that those who have power in their hands will not give it up while they can retain it." *Id.* at 266. As General Pinckney of South Carolina bluntly said:

[I]f the revision of the census was left to the discretion of the Legislature, it would never be carried into execution. The rule must be fixed, and the execution of it enforced by the Constitution. *Id.* at 277.

In addition to deciding to mandate a census, Convention delegates further limited Congressional discretion, defining how the census must be taken, including requirements that the census be conducted every ten years and that it be based upon an actual enumeration of people — not an estimate of the

wealth of the people. Again, the delegates were concerned that if Congress were left to its own discretion, "[t]he danger will be revived that the ingenuity of the Legislature may evade or pervert the rule so as to perpetuate the power where it shall be lodged in the first instance." *Id.* at 279. Having so limited the discretion of Congress, the Convention produced a permanent, fixed standard — an absolute rule — of reapportionment. Alexander Hamilton could assure the American people that the House of Representatives would truly be representative of the people, free from "partiality" and "oppression." *The Federalist* No. 36; see also *The Federalist* No. 58.

For over 200 years this absolute rule has served the nation well. Now, however, the current Administration seeks to abandon it. Appellants claim the authority to forego the census's continuous reliance upon an actual headcount of the people in favor of an estimate based upon statistical sampling. They rest their claim upon the contention that their sampling estimate would improve the accuracy of the census. This claim of improved accuracy, in turn, is based upon an estimate that the 1990 census could have been more accurate had it been based upon statistical sampling.

Such claims of enhanced accuracy are suspect for at least two reasons. First, sampling methods clearly are no guarantee of accuracy. Indeed, following the 1990 Census enumeration, then-Secretary of Commerce Robert Mosbacher decided not to use statistical sampling to adjust the 1990 figures — in part because of the widely divergent results caused by even the smallest changes in the assumptions undergirding the statistical models available to him. *Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made, etc.*, 56

Fed. Reg. 33583 (July 15, 1991). Moreover, he observed that the development of a statistical model required essentially arbitrary decisions, which, in turn, would result in significantly different census results. *Id.* at 33600-03.

Second, the discretion inherent in the adoption and development of statistical models offers ample room for the very kind of political manipulation of the apportionment process that the Framers sought to avoid. After all, the constitutional limits upon the conduct of the census were not based upon an absence at that time of sophisticated statistical tools to arrive at an accurate estimate of the population. Rather, they were based upon the unchanging "truth...that all men having power ought to be distrusted to a certain degree." *Madison's Notes, supra*, p. 272.

Convinced of the "political depravity of man," as Madison put it, *id.*, the Constitution's framers were not willing to entrust Congress, despite all of its internal checks and balances, with the kind of discretion that appellants now claim for one man. There is far greater danger of partisan political manipulation when the conduct of the census reposes in a single individual's discretion.

The maintenance of the House of Representatives as the branch of the national legislature proportioned to the actual population of the states, as mandated by the Constitution, is reason enough to deny appellants the discretionary power that inevitably attends a census conducted by statistical sampling.

## **B. An Actual Enumeration for Apportionment Is Essential to Preserve Public Confidence in the Integrity of the Apportionment Process**

In addition to concerns expressed about the integrity of the House of Representatives as a representative body apportioned to the population of the several states, the Constitution's Framers were concerned about ensuring the people's confidence in that body. Already mindful of the western migration of the American people, convention delegate George Mason of Virginia expressed concern that, as new states were added to the Union, they be "treated as equals and subjected to no degrading discriminations." If the people in these new states were deprived of their "equal footing" in the House of Representatives, then, he predicted, they "will either not unite with or will speedily revolt from the Union...." *Madison's Notes, supra*, at 267. Mason's fellow Virginia delegate, Edmund Randolph, echoed this concern, claiming that "[i]f a fair representation of the people be not secure, the injustice of the Government will shake it to its foundations." *Id.* at 268.

Justice Joseph Story reaffirmed the importance of having a House of Representatives which is truly representative of the people. He observed that apportioning membership in that legislative branch on the basis of population "had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other which could be devised." Joseph Story, *Commentaries on the Constitution of the United States*, Section 633 (1833 ed.).

To ensure public trust, the Constitution withheld discretion from Congress as to how or whether to conduct a census, lest



they "sacrifice their trust to momentary considerations." *Madison's Notes, supra*, at 268. In other words, the Framers understood that the people's confidence in the integrity of the new House of Representatives depended upon a census that was not subject to political manipulation. Thus, they provided for an apportionment based upon actual enumeration of the people, rather than some other method susceptible, in the words of Justice Story, to "fraud and evasion."

### C. An Actual Enumeration for Apportionment Is Essential in Order to Guard Against the Appearance of Political Manipulation

This year, Deputy Secretary of Commerce Robert L. Mallett remarked to the National Association of Development Organizations that "[t]he Census isn't a trivia collection. **It is the measure we use to distribute political power in the country....**" Regulatory Intelligence Data (April 27, 1998) (emphasis added). The admitted significance of a properly conducted census deserves attention, especially in light of the increasing politicization of the Commerce Department — which will supervise conduct of the 2000 Census.

Investigations conducted by the 105<sup>th</sup> Congress have reported to the American people concerning the extent of the Commerce Department's politicization. For example, in testimony before the Senate Committee on Governmental Affairs, Richard Sullivan, a former National Finance Director for the Democratic National Committee ("DNC"), addressed the relationship between this national political organization and the Commerce Department under Secretary Brown:

Ron Brown was an aggressive Commerce Secretary. There was always this criticism that we were getting about, you know, the ties between DNC and Commerce. [Senate Committee on Governmental Affairs, 105<sup>th</sup> Cong., 2d Sess., Final Report of the Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns, ("Senate Report") "John Huang Moves From Commerce to the DNC," 20 (1998).]

After the 1992 presidential elections, the DNC identified individuals to the Commerce Department as candidates for positions at the Department. For example, John Huang, Principal Deputy Assistant Secretary for International Economic Policy, was hired after the DNC identified him as a "must-consider" candidate for several positions, including Undersecretary for International Trade at the Department of Commerce. *Id.* at 4. Jude Kearney was appointed Deputy Assistant Secretary for Service Industries and Finance after a DNC document identifying him as a candidate for that position was received by the Commerce Department. February 16, 1998 Deposition of Jude Kearney, House Committee on Government Reform and Oversight, p. 6; House Committee on Government Reform and Oversight, Interim Report, 105<sup>th</sup> Cong., 2d Sess. ("House Report"), "Yah Lin Charlie Trie and His Relationship With the Clinton Administration," p. 15 (1998).

Moreover, Commerce Department personnel have come under serious suspicion of improper pursuit of political objectives in a variety of ways. The Boston Globe reported that "[b]usinesses that gave Democratic Party committees more than \$2.3 million...won coveted seats on U.S. trade missions

during President Clinton's first term." (They also secured nearly \$5.5 billion in support from the U.S. Overseas Private Investment Corporation ("OPIC")). Hohler, *Trade-trip Firms Netted \$5.5 Billion in Aid; Donated \$2.3 Million to Democrats*, Boston Globe, March 30, 1997, A1.<sup>10</sup>

Prominent DNC fundraisers were placed on official trade missions. For example:

Mr. [Howard] Glicken even accompanied the late Commerce Secretary Ron Brown on a 1994 export promotion tour through Latin America. His mere presence troubled some delegation members: Mr. Glicken's 'wheeling and dealing' reportedly 'evoked squeamishness among a number of officials at Commerce.' His inclusion thus raised the specter of political considerations possibly affecting Commerce Department decision-making. [House Report, "FEC Enforcement Practices and the Case against Foreign National Thomas Kramer: Did Prominent DNC Fundraisers Receive Special Treatment?", p. 17.]

In addition, Secretary Brown directly participated in DNC fundraising events. For example, during an official Commerce Department trip to East Asia, Secretary Brown headlined a DNC fundraiser in Hong Kong on October 18, 1995. House

<sup>10</sup> The Globe noted that "one of [Secretary] Brown's top associates, Jeffrey E. Garten, then undersecretary for international trade, served on OPIC's board of directors." An OPIC spokeswoman stated that "agency officials 'may or may not have known' that companies applying for assistance had contributed to Democratic committees or sent executives on missions with Brown." *Id.*

Report, "Yah Lin Charlie Trie and His Relationship With the Clinton Administration," pp. 24-27. Secretary Brown later headlined a DNC fundraiser in Washington, DC on November 8, 1995. *Id.*, pp. 27-29; House Report, "Unprecedented Obstacles to the Committee's Investigation," p. 17.

John Huang, who served as Principal Deputy Assistant Secretary for International Economic Policy from July 1994 to December 1995, engaged in fundraising for Democrats while at Commerce. Senate Report "John Huang at Commerce" 12 (1998). While serving in the Commerce Department, Huang successfully solicited contributions from four donors. *Id.* at 64. Huang was also reportedly involved in organizing a "fundraising apparatus" for the Democratic National Committee while at Commerce, and in planning a Democratic National Committee fundraiser while at Commerce. *Id.* at 65-67.

According to the Senate Report, Huang had "frequent" contacts with Democratic National Committee finance officials while working at Commerce. *Id.* at 63. "Message slips and long distance calls alone...reveal scores of calls between Huang and DNC officials." *Id.* at 64.

While these reported accounts of the Commerce Department's politicization do not prove that the Census Bureau would engage in political manipulation of Census 2000 figures, it demonstrates the American people would reasonably fear such manipulation could occur. In fact, former Commerce Secretary Mosbacher noted the opportunity for manipulation in his decision not to use statistical sampling to adjust 1990 census figures. *See Decision of the Secretary of Commerce*, *supra*, 56 Fed. Reg. 33583, 33585, 33599-603. The potential for abuse of such opportunity would come as no surprise to our



Founding Fathers, who were well aware of "the political depravity of man." *Madison's Notes, supra*, at 272. This awareness led them to establish a constitutional mandate that the basic method of conducting the decennial census for purposes of apportionment would never be entrusted to the discretion of government officials.

### CONCLUSION

For the foregoing reasons, *amici curiae* National Citizens Legal Network, U.S. Border Control, Lincoln Institute for Research and Education, English First Foundation, and Policy Analysis Center respectfully submit that the judgment of the courts below should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,  
*Appellants,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,  
*Appellees.*

On Appeal from the United States District Court  
for the District of Columbia

**BRIEF OF AMICUS CURIAE  
THE FOUNDATION TO PRESERVE THE  
INTEGRITY OF THE CENSUS  
IN SUPPORT OF APPELLEES**

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**INTEREST OF AMICUS CURIAE**

The Foundation to Preserve the Integrity of the Census (the "Foundation") is an independent, non-profit, non-partisan organization chartered to educate the public regarding the decennial census.<sup>1</sup> Since 1790, the census has determined essential information about the people of the United States that guides Congress in developing legis-

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<sup>1</sup> The Foundation is not related in any way to any party in this case, and no party or its counsel has authored any part of the Foundation's brief. No person or entity other than the Foundation and its counsel has made a monetary contribution to the preparation or submission of this brief.



lative programs and guides the Executive Branch in carrying out those programs. The census serves many purposes beyond its constitutional purpose of apportioning Congressional representatives among the fifty states. In its 1997 *Report to Congress: The Plan for Census 2000*, the Census Bureau ("Bureau") announced its plan to use statistical sampling in an attempt to make the year 2000 census more accurate in carrying out its bedrock constitutional purpose of apportionment. Joint Appendix ("J.A.") 34-147. According to that *Report*, statistical sampling is the only means of achieving an accurate count of the population of the United States and has been strongly endorsed by knowledgeable statisticians. The Foundation believes, to the contrary, that the use of statistical sampling in the census cannot increase its accuracy in determining exactly where the people of the United States live and how many of them there are. Accordingly, the sampling plan cannot increase the accuracy of the census in accomplishing its core constitutional purpose of apportionment. Indeed, the statistical sampling proposed by the Bureau will almost certainly make the census less accurate and undermine its legitimacy.

The Foundation submits this brief to inform the Court about factual and statistical issues relevant to the legal issues in this case.

Counsel for the parties have consented to the filing of this amicus brief. Their letters of consent have been filed with the Clerk.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Bureau proposes to change the traditional census methodology of "physical enumeration"<sup>2</sup> by using statistical sampling at two stages for two different purposes. *First*, the Bureau proposes to use statistical sampling to speed up—and reduce the cost of—the traditional follow-

<sup>2</sup> This is the term used in the Bureau's *Report to Congress*. *E.g.*, J.A. 121.

up applied to households that fail to return a census form (called "Non-Response Follow-Up" or "NRFU"). *Second*, the Bureau proposes to determine the degree to which particular groups in each state have been "missed" and to adjust correspondingly the numbers from the traditional "physical enumeration." This second use of statistical sampling is called "Integrated Coverage Measurement" or "ICM." It is based on the "Post Enumeration Survey" or "PES" that was carried out in connection with the 1990 census.<sup>3</sup> This second use of statistical sampling is by far the "most critical" one, as the Bureau acknowledges. J.A. 92. The use of statistical sampling to correct for individuals who have been missed in the census, and thus to eliminate the undercount in previous censuses, is supposed to make the 2000 census 99.9% accurate—much more accurate than any previous census.<sup>4</sup> The Bureau claims statistical sampling will greatly reduce differences in the rate at which members of different demographic groups in different locations are undercounted. *E.g.*, J.A. 117, 358-61, 372, 411-13.

The Bureau intends to "correct" the census count in the year 2000 to include individuals who have been missed. It will attempt to do that based on the results of the ICM "mini-census" of 25,000 census blocks randomly selected from the 7 million census blocks nationwide. J.A. 92-98, 364-68.<sup>5</sup> After the initial census count,

<sup>3</sup> The 1990 PES was judged too inaccurate and unreliable to use to adjust the actual census count.

<sup>4</sup> The Bureau does not claim that statistical sampling as part of the NRFU will increase the accuracy of the census. *See, e.g.*, J.A. at 158-59 (claiming only that "[i]t will ensure that we can complete our personal visits with no loss of accuracy but with substantial savings of time and money") (emphasis added). Indeed, statistical sampling will make it less accurate. *See* n.12, *infra*.

<sup>5</sup> On average, a census block contains 30 housing units. J.A. 94. For each state, the Bureau plans to define non-overlapping groups of census blocks (called "strata") that are homogeneous with regard to characteristics of their population that the Bureau thinks affect the likelihood that they will be counted in the census—for

the Bureau will attempt to contact every household in the randomly selected blocks, creating an "independent roster of Census Day residents." J.A. 95. That is, within these blocks, the Bureau will conduct a second census, on a smaller scale but more intensively.

The individuals surveyed in these blocks will be grouped into homogeneous groups (called "post-strata") that have what the Bureau considers to be a similar likelihood of being counted in the traditional census. These "post-strata" will be defined by known characteristics associated with the census undercount, such as age, race, gender and housing status (renter versus home-owner)—for example "Black male renters aged 20-29 living in New York State" or "Hispanic male renters aged 30-39 living in California."

Individuals included in the "independent roster" from this mini-census but not in the traditional census will be judged to have been missed. J.A. 95-96. Comparing the results of the traditional census with the results of the mini-census of these randomly selected blocks, the Bureau will determine an "estimation factor" for each post-stratum in each state reflecting the likelihood that individuals in each post-stratum were missed. These estimation factors will be used to "correct" the initial counts for all demographic groups with the same characteristics (such as "Hispanic male renters aged 30-39") in every block throughout the state. The adjusted state counts will be totaled to yield an adjusted count for the nation. J.A. 97-98.

In fact, the Bureau's ICM sampling plan is unlikely to enhance the accuracy of the census. The estimated undercount in the census is very small by statistical standards—approximately 1.8% of the population in the Bureau's

example, "[a]ll blocks in large central cities with a 1990 Census population that was 30% or more African American renters with 10% or more Hispanic renters." J.A. 94. *Accord* U.S. Bureau of the Census, "ICM Stratification and Poststratification: Research Plans for Census 2000," April 24, 1998, at 1. The blocks for the mini-census are randomly selected from these strata.

best estimate. J.A. 40. Even a perfectly designed and executed sampling plan would have difficulty reducing such a low error rate in such a large population. Both sampling and nonsampling error are inevitable in any statistical sampling. Even very small errors are greatly magnified when applied to the estimated 98.2% of the population that was correctly counted. This "magnification" problem is aggravated in the context of the census because a large percentage of those "missed" in the traditional census probably did not wish to be counted. They are therefore likely to evade the census-takers in the ICM mini-census too. As a result, data on the population actually undercounted are especially likely to be inaccurate. Using those inaccurate data to "correct" the undercount is far more likely to distort the census count than to make it more accurate.

The Bureau's sampling plan can be expected to distort the census count, rather than enhance its accuracy, because of sampling and nonsampling errors that have been recognized in the past and cannot be eliminated. There were intractable problems in 1990 matching the returns from the traditional census with the returns subsequently obtained from the same households in the 1990 mini-census of randomly selected areas. Mini-census returns that cannot be matched with the traditional census returns are assumed to identify households that were missed in the traditional census. Even a small number of matching errors—identifying households as "missed" that were actually counted—can have a very large impact on the final census count because the results of the small mini-census are used to "adjust" the nationwide census count.

The adjustment process also distorts the national count because it assumes that all members of a defined group (such as "Hispanic male renters aged 30-39") are uniformly likely to have been undercounted everywhere within a state. The adjustment process, accordingly, will increase the count for that group throughout a state by the same



percentage. The likelihood that some mini-census returns will be fabricated, especially in inner-city areas, makes this problem worse. Fabricated returns, for example, may create "Hispanic male renters aged 30-39," to use the same example, who will appear to have been uncounted because they do not exist. These fabricated returns will thus increase the weight given to all the "Hispanic male renters aged 30-39" who were counted in every area of a state.

These and other similar problems with the Bureau's plan have led many statistical experts who have looked closely at the plan's details to question its validity. Contrary to the Bureau's claim, its plan has not been endorsed by a consensus of informed scientific opinion. The endorsements are vaguely general or contingent upon assumed conditions the plan is unlikely to meet. The claimed "consensus" is illusory.

In fact, use of statistical sampling to correct for a very small estimated undercount nationwide can be expected to make the 2000 census much less accurate, introducing substantial distortions based on both sampling and non-sampling error.

### ARGUMENT

#### I. THE UNDERCOUNT IN THE TRADITIONAL CENSUS IS VERY SMALL, NEARLY IRREDUCIBLE, AND PROBABLY BEYOND THE CAPABILITY OF STATISTICAL SAMPLING TO CORRECT

The Bureau estimates that the 1990 census missed 1.8% of the United States' population, or 4.7 million people—despite being better designed and more expensive than the 1980 census. J.A. 40.<sup>6</sup> The Bureau charac-

<sup>6</sup> The exact size of the undercount in the census can only be estimated. Until 1990, undercount was estimated by comparing the census count with the results of "demographic analysis," which uses data on births, deaths, immigration, and emigration and earlier census data to estimate the number of persons living in the United

terizes this estimated undercount as "a large step backwards in terms of accuracy," compared to the 1980 census, which (the Bureau estimates) missed 1.2% of the population. *Id.* The Bureau predicts that, without correction by statistical sampling, the undercount in the 2000 census will increase further to 1.9% of the population. J.A. 121. Worse, the Bureau predicts, the differential undercount of certain segments of the population in certain areas will continue to increase. *E.g.* J.A. 51-52. It is this undercount that the Bureau's sampling plan is designed to address. Indeed, the entire purpose of the plan is to greatly reduce or eliminate the estimated undercount.

To understand why the Bureau's plan to use statistical sampling to reduce this estimated undercount is inherently flawed and cannot be expected to work, it is essential to recognize three interrelated key facts. *First*, the estimated undercount is very small; *second*, the estimated undercount is probably largely inherent in the nature of the population that is missed in the census; and *third*, the Bureau proposes to reduce this very small undercount in the census through a second, much smaller census that is likely to miss the same people as the traditional census. The data from the smaller census will thus be poorest where they are most important, making the most important adjustments to the traditional census count the least accurate. These three factors make it virtually impossible for any statistical sampling, no matter how well designed and executed, to make the census more accurate.

#### A. The Estimated Undercount Is Very Small By Statistical Standards

A nationwide undercount of 1% to 2% is very small, given the size of the population and the difficulties in-

States. J.A. 48 (Report to Congress), 368 (Fienberg Declaration), 410 (Estrada Declaration). In 1990, the Bureau also used statistical sampling, but this statistical sampling found less than half the undercount estimated by demographic analysis. J.A. 369 (Fienberg Declaration).

herent in the enumeration process. A margin of error of 1% to 2% is extraordinarily low by statistical standards—and is very difficult to achieve, given the sampling and nonsampling errors inherent in the process. To *estimate* the size of the population with a high level of confidence to within 1% to 2% of its actual number by statistical sampling would be a daunting and very likely impossible task. To use statistical sampling to *adjust* the census count requires a substantially lower margin of error in the statistical sampling than in the unadjusted census count. Any error in the adjustment factor intended to correct for missing a relatively small part of the population will be magnified many times over as it is applied to the 98% to 99% of the population that was correctly counted.<sup>7</sup> To improve on the estimated undercount in the 1990 census through the use of statistical sampling would thus be difficult, if not impossible, under ideal circumstances. The decennial census presents circumstances far from ideal.

**B. The Estimated Undercount Probably Consists Largely of Groups Much More Difficult to Count Than the Rest of the Population**

The Bureau itself attributed the estimated increase in the 1990 census's undercount to factors that will continue to pose problems for statistical sampling as much as for attempts at a direct enumeration. Those factors include:

- fewer people at home when enumerators visited;
- more people at home but unwilling to take the time to fill out a census form;

<sup>7</sup> See Kenneth Darga, "Straining Out Gnats and Swallowing Camels: The Perils of Adjusting for Census Undercount" (hereinafter "Darga, 'Gnats and Camels'") and "Quantifying Measurement Error and Bias in the 1990 Undercount Estimates" (hereinafter "Darga, 'Error and Bias'"), Office of the State Demographer, Michigan Department of Management and Budget (April 29, 1998) (prepared testimony presented to the House of Representatives Subcommittee on the Census in May 1998).

- more people living in gated communities where security guards do not cooperate with enumerators;
- more people "alienated from society in general and more mistrustful of government in particular [and] more concerned about privacy."

J.A. 51.

Worse, many segments of the population that census-takers are especially likely to miss are growing more rapidly than the rest of the population. These segments include people living in illegal housing units; people believing that census information will not be kept confidential; and people relying on concealment to protect their resources. J.A. 52. As one of the experts for the Bureau acknowledges, the Bureau has difficulty reaching people living in illegally subdivided homes because it is difficult to obtain addresses for them. J.A. 411. If the Bureau had an address for residents of illegal housing, those residents could be expected to evade the census-taker for fear of losing their housing. Similarly, the Bureau's expert acknowledges, "probation violators, debtors hiding from creditors, and battered spouses hiding from their partners" will "seek not to be counted," even if the Bureau has their addresses. J.A. 412. So will those who "fear discovery by federal authorities, *e.g.*, undocumented immigrants." *Id.* The number of illegal immigrants alone now exceeds the total estimated undercount in the 1990 census.<sup>8</sup> Parents failing to make court-ordered child-support payments could similarly be expected to evade the census-taker.

<sup>8</sup> The Immigration and Naturalization Service estimates that there were 5 million illegal immigrants in the United States in October 1996 (plus or minus 400,000). 74 INTERPRETER RELEASES 298 (February 24, 1997). At the same time, the INS adjusted upwards its estimate of the number of illegal immigrants who had been in the United States in 1992 from 3.4 million to 3.9 million. *Id.* For numbers of other groups that can be expected to avoid the census-taker, *see* Darga, "Gnats and Camels," at 1.



In 1995, there were over 19 million cases in the Child Support Enforcement Program.<sup>9</sup>

**C. The Population "Missed" in the Traditional Census Is Likely to Be Missed Again in the Attempt to Adjust for the Undercount**

The Bureau plans to determine what groups the traditional census missed—and in what proportions—through a second, smaller census of a randomly selected group of 25,000 census blocks out of the 7 million census blocks nationwide. Only the areas to be canvassed in this ICM mini-census constitute a random sample. Within the sample blocks, the Bureau will conduct a second census and then compare its results with the results of the larger census. It will then attempt to adjust the results of the larger census (already 98% to 99% accurate) based on the differences it finds between the two results.

To the extent that individuals "missed" in the physical-enumeration phase of the census deliberately evaded the census-taker, they can be expected to evade the Bureau's subsequent mini-census too. There is no reason to think that these difficult-to-count individuals who are suspicious of government will be more willing to sit down with a census-taker equipped with a laptop computer<sup>10</sup> than they were to mail in a traditional census form or to sit down with a census-taker equipped with a pencil and paper form as part of the traditional census's follow-up for households that did not mail in a form. Moreover, to the extent that language is a barrier to an accurate count—as the Bureau concedes it often is, J.A. 51—the Bureau employee with his or her laptop computer can be

<sup>9</sup> BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1997, Table 611 at 390.

<sup>10</sup> Under the Bureau's plan, "enumerators will administer the ICM questionnaire and enter data via laptop computers." J.A. 95.

expected to have *more* difficulty collecting information than the traditional census with its mail-in forms. These forms will be available in many languages besides English in the 2000 census, and the non-English speaker can obtain assistance from friends or neighbors in translating questions and answers. Filling out paper forms is also more anonymous than a face-to-face interview. Anyone unwilling to complete a paper census form or talk to a census-taker following up because he or she does not trust the government or wants to escape its notice is unlikely to agree to an interview with a census-taker armed with a laptop computer.

One of the Bureau's experts concedes that "undercount is a consistent and unavoidable feature of census-taking." J.A. 410. The "feature" of the traditional census that the Bureau will attempt to correct by statistical sampling can be expected to reappear in the ICM mini-census that is supposed to correct the 1% to 2% undercount.<sup>11</sup>

**II. THE CENSUS BUREAU'S PLAN CAN BE EXPECTED TO DISTORT RATHER THAN CORRECT THE POPULATION COUNT IN THE TRADITIONAL CENSUS—ESPECIALLY FOR PURPOSES OF APPORTIONMENT**

The problems inherent in attempting to correct a 1%-2% undercount would be reason enough to question the Bureau's sampling plan for the 2000 census. However, the Bureau's plan is also infected with specific deficiencies and likely errors that will probably distort the population count.

<sup>11</sup> The sample that will be used to adjust the 2000 census results will be five times as large as the corresponding sample in 1990—25,000 blocks (about 750,000 housing units) as opposed to 5,000 blocks divided into demographically similar groups or strata. J.A. 93-94, 371. The strata in 1990 crossed state lines; the strata in 2000 will not. J.A. 94, 372-73. Limiting strata to state boundaries will largely eliminate the statistical benefits of a larger overall sample in 2000.

Many different kinds of error affect the accuracy of any statistical survey. These kinds of error are broadly divided into two categories: (1) sampling error and (2) nonsampling error. Sampling error occurs because a random sample does not exactly reflect the population from which it is drawn. Nonsampling error (or bias) includes everything else that distorts the result besides the random luck of the draw. See J.A. 115-16. Only nonsampling error can occur in the traditional census (because a census is not a random sample). Both sampling and nonsampling error affect the reliability of the Bureau's planned "correction" of the traditional census count. As the Bureau acknowledges, measuring and reducing nonsampling error is more complex than measuring and reducing sampling error, and the nonsampling error is more serious. *Id.*

A combination of sampling and nonsampling error makes it likely that the Bureau's attempt to adjust the census count will not only fail to improve the traditional census count but will actually distort the count and produce less accurate data because very small errors in the "corrective" mini-census will have an exaggerated impact on the 98% to 99% correct count from the traditional census.

#### A. Sampling Error

Sampling error will occur because (1) the strata are not perfectly homogeneous, (2) the blocks selected from them do not perfectly reflect the composition of the strata, and (3) individuals assigned to each post-stratum do not perfectly reflect the population of the post-stratum.<sup>12</sup>

<sup>12</sup> The Bureau's NRFU plan will also introduce sampling error into the census by truncating the conventional follow-up for households that do not send back a census form. The Bureau will use sampling to determine which units to contact to bring the total percentage of units contacted up to 90%. (For example, if only 60% of the housing units in a tract return a census form, three out of four of the remaining housing units will be sampled to achieve the 90% goal.) After sampling is complete, the Bureau will use

The Bureau's methodology calls for dividing the population into post-strata defined by demographic criteria. Differences between the census and the mini-census are used to calculate net undercount rates for each post-stratum. These rates are then used to adjust all post-strata in every block through extrapolation; that is, the rates calculated from the 25,000 census blocks in the mini-census will be applied to all 7 million blocks across the country.

In applying rates from the randomly selected census blocks within a state to all census blocks within a state, the Bureau relies on the "homogeneity assumption." That is, the Bureau assumes that undercount rates for each post-stratum are constant across an entire state, or homogeneous. The result is that

the number of Hispanic male renters age 30-39 in every single block in California—from the barrios of east Los Angeles to the affluent suburbs of Marin County and beyond—would be scaled up by the same adjustment factor.

Lawrence D. Brown, et al., "Statistical Controversies in Census 2000," Technical Report, Dep't of Statistics, U.C. Berkeley (October 1998) (hereinafter "Brown 1998") at 9.

information from the 90% of units actually contacted to estimate characteristics such as race and size of household for the remaining 10%. See J.A. 88-92; Preston Jay Waite & Howard Hogan, Bureau of the Census, U.S. Dep't of Commerce, "Statistical Methodologies for Census 2000: Decisions, Issues and Preliminary Results," presented at the Joint Statistical Meetings, Dallas, Texas, Aug. 1998, at 2-5. The Bureau's NRFU sampling plan has never been tested on a national basis, and the accuracy of the imputation process is unknown. See Congressional testimony of Robert A. Koyak, Sep. 17, 1998. It seems likely that the NRFU will be less accurate than the traditional attempt at 100% enumeration. The Bureau proposes to use statistical sampling at this stage of the 2000 census in order to save time and money that can then be used in the ICM stage of the Bureau's plans.



However, if the rates for a demographic group *differ* in various geographic areas within a state, applying the same adjustment factor to members of this demographic group in every census block will decrease rather than increase census accuracy. For example, if the net undercount rate for Hispanic male renters age 30-39 calculated from the randomly selected California blocks in the mini-census is 4%, but the undercount rates for the blocks in the state that were not randomly selected are in the 2-3% range, adjustment will erroneously increase the census count.

Research on the adjustment proposed in 1990 indicates considerable heterogeneity in undercount rates. See David Freedman & Kenneth Wachter, *Heterogeneity and Census Adjustment for the Post-Censal Base*, 9 STATISTICAL SCIENCE 476-485 (1994). This finding is not surprising. By assuming constant net undercount rates for demographic post-strata across vastly different geographic areas, the Bureau implicitly assumes that all the factors affecting the undercount for each post-stratum—such as poverty, immigration status, suspicion of government—all have the exact same effect on whether or not an individual is enumerated by the census.

In order to address concerns about heterogeneity, the Bureau has confined strata and post-strata adjustment within state boundaries. (In 1990, strata and post-strata adjustments applied across state lines.) Unfortunately, this change increases the number of strata and post-strata. That, in turn, increases sampling error and largely offsets the decrease in sampling error that would otherwise follow from the 5-fold increase in the number of blocks sampled. Partly as a result, the Bureau has also decided to drop one type of strata classification: area of residence (urban, suburban, or rural). Thus heterogeneity may be more problematic in 2000. See Brown 1998 at 9.

## B. Nonsampling Error

Nonsampling error in processing and interrelating the data from the traditional census and from the ICM mini-census is much more serious than sampling error. In 1992, a high-level committee within the Census Bureau—the CAPE Committee<sup>13</sup>—estimated that about half the statistically estimated undercount in the 1990 census was “actually measured bias [another term for nonsampling error] and not measured undercount.” CAPE Report at 15. Nonsampling error can take many different forms. We focus here on data errors (including fabricated interviews), computer errors, correlation bias, and matching errors.

### 1. Data Errors

“Bad” data constitute nonsampling error. “Bad” data include incorrectly entered addresses, illegible forms, duplicate forms not recognized as such, incomplete or incorrect information provided by census respondents, and fabricated interviews either during the non-response follow-up of the census or during the mini-census survey.

<sup>13</sup> “CAPE” stands for “Committee on Adjustment of Postcensal Estimates.” The CAPE Committee was formed in 1991, after the Secretary of Commerce decided against adjusting the 1990 census count. It consisted of “a senior level group of the Bureau of the Census statisticians and demographers,” meeting regularly with the Director of the Census. Its mission was to direct additional research to determine whether the statistical sampling methodology that had been considered inadequate to adjust the 1990 census could be refined enough to improve “intercensal population estimates,” for which high rates of error at the level of census blocks and census tracts would not be an issue. Intercensal population estimates “are not prepared for census tracts and blocks, or used for redistricting, as are census data.” Statement of the Director of the Census, December 29, 1992, 58 Fed. Reg. 69, 70 (1993). The CAPE Committee’s report, “Assessment of Accuracy of Adjusted versus Unadjusted 1990 Census Base for Use in Intercensal Estimates,” August 7, 1992, is cited herein as “CAPE Report.”

The Bureau has wrestled with all of these. After the 1990 census the Bureau did an extensive series of evaluation studies on the 1990 mini-census, which resulted in over a dozen different reports totaling almost one thousand pages. See CAPE Report at 9. Based largely on the Bureau's own studies, some statisticians have independently concluded that at least 80% of the individuals who would have been added through statistical adjustment to the 1990 census really reflect bad data. See L. Breiman, *The 1991 Census Adjustment: Undercount or Bad Data?* 9 STATISTICAL SCIENCE 458, 472 (1994) (hereinafter "Breiman 1994").

a. *Incorrectly Recorded Addresses*

The Bureau assigns housing units to census blocks by address. (This is called geocoding.) Mistakenly recording an address as "1075 Main Street" rather than "1076 Main Street" would put the household on the other side of the street and in the wrong block. Office of Inspector General, U.S. Dep't of Commerce, "2000 Decennial Census: Key Milestones and Associated Risks" (December 1997) at 10 (hereinafter "1997 Inspector General's Report"). If either the initial census or the mini-census incorrectly assigns a housing unit to the wrong block but the other does not, the individuals in that unit will appear to have been missed by the census. Recognizing this problem, the Bureau in 1990 regularly searched one or two rings of blocks around each mini-census sample block in order to correct for geocoding errors. Over 4 million individuals would have been added to the national census count without this wider search. It is unclear how many additional geocoding errors would have been discovered if the search areas had been even larger.<sup>14</sup> Given the

<sup>14</sup> Entering "1300 Main Street" incorrectly as "1800 Main Street" would sort the household 5 blocks down the street. See 1997 Inspector General's Report at 10.

large number of errors caught by searching in the one- and two-block rings, it is likely that there may have been substantial geocoding errors outside the search area that were *not* caught and inflated the undercount rate. See Breiman 1994 at 467-468.

For the 2000 census, the Bureau has decided to limit its search to the blocks in the sample and not to search the surrounding blocks as it did in 1990. 1997 Inspector General's Report at 10. Given the extent to which matches were found in surrounding blocks in 1990, substantial geocoding errors seem likely in 2000. *Id.*

b. *Fabricated Interviews*

Fabricated interviews—or "curbstoning"—are a serious problem for any survey. It is an especially serious problem when it occurs in a mini-census intended to correct the census count. Fabricated households in the mini-census will appear to have been missed. If not recognized as spurious, they will be included in a correction factor applied to an entire post-stratum. Instead of the single wrong count in a census, an undetected fabrication in the mini-census will effectively be counted many times over. Studies show that temporary workers are more likely to fabricate than permanent interviewers. Unfortunately, the Bureau is forced to rely on temporary workers for much of its interviewing, both in the census and the mini-census. Studies also show that interviews are more likely to be fabricated in difficult areas. See L. Stokes & P. Jones, *Evaluation of the Interviewer Quality Control Procedure for the Post-Enumeration Survey*, PROCEEDINGS OF THE SURVEY RESEARCH METHODS SECTION, AMERICAN STATISTICAL ASSOCIATION, at 696-698 (1989). These studies imply that fabricated interviews will not be distributed randomly but instead will occur disproportionately in minority and urban areas.

The fabrication rate from the 1990 mini-census is impossible to know exactly. See Kristen K. West, "1990



Post-Enumeration Survey Evaluation Project P6: Fabrication in the P-Sample: Interviewer Effect" (July 10, 1991) (hereinafter "West 1991");<sup>15</sup> Breiman 1994 at 467. The Bureau itself estimated that between 0.5% and 1.5% of its interviews were fabricated. West 1991 at 1; P. Biemer & S. Stokes, *The Optimal Design of Quality Control Samples to Detect Interviewer Cheating*, 5 JOURNAL OF OFFICIAL STATISTICS 23-29 (1990). Others have estimated a fabrication rate between 0.03% and 8.79%. Breiman 1994 at 467; Darga, "Error and Bias," at 5-7. An undetected fabrication rate of 0.03% (the low end of the estimated range) would have added 50,000 individuals to the final national census count erroneously. A much higher fabrication rate is more likely. A fabrication rate of 1% in the 1990 mini-census would have added 1,650,000 individuals to the national census count. Breiman 1994 at 467. A comparable or greater rate of error resulting from fabricated interviews is likely in the 2000 census.

## 2. Computer Errors

The census is a mammoth task that must be completed within a relatively short time. To do that, the Bureau relies on complicated computer programs. Errors in those programs are nonsampling errors. They can be difficult to identify. A computer processing error in 1990 overstated the undercount by almost 20% (as 2.1% instead of 1.7%). CAPE Report at 15. The error was discovered a year after the census, in the spring of 1991. *Id.* The Bureau uses statistical models to assist it in matching and cross-checking records. It uses statistical models to decide whether two records come from the same household. How many errors these programs are responsible for is uncertain. See Breiman 1994 at 469-470; Brown

<sup>15</sup> This is one of the internal studies done by the Bureau to assess its PES mini-census in 1990. "P-sample" refers to the records of that mini-census.

1998 at 5 (providing additional references); Congressional testimony of Philip Stark, May 5, 1998.

In the 2000 census, the Bureau will not only mail out census forms (as it has in the past). It will provide "multiple opportunities, and multiple methods, to respond"—thereby "increas[ing] the possibility of multiple responses for a given person." J.A. 64. The Bureau is relying on "advances in computer technology" to avoid an "undue risk to the accuracy of the resulting census data." *Id.* As of December 1997, however, the Bureau had not developed or tested the software required to identify and eliminate duplicate responses. 1997 Inspector General's Report at 10. A single error, deeply embedded in thousands of lines of computer code—like that discovered by the CAPE Committee—can undo many if not all of the gains promised for the Bureau's plan.

## 3. Correlation Bias

Certain groups of people are likely to be missed by both the initial census enumeration and the mini-census. These include homeless people, illegal immigrants, and others who may try to evade the census. Individuals missed in both the traditional census and the mini-census constitute "correlation bias." See CAPE Report at 7, 15 n.2, 22-23; Morris L. Eaton, et al., "Planning for the Census in the Year 2000: An Update," Technical Report No. 484, Dep't of Statistics, U.C. Berkeley, at 2 (June 19, 1997). Correlation bias is a measure of how far out of calibration the adjusted returns are because both the census and the mini-census are missing the same people for some systematic reason, and not mere chance. The Bureau tries to take correlation bias into account, but this is hard to do when the size of the groups being systematically missed is unknown but large.

Correlation bias is especially problematic if it exists at different levels among the states. The 1990 census

indicates that this is the case. States with large minority populations in the Northeast would have lost population shares under the adjustment that the Bureau proposed.<sup>16</sup> These Northeast states, however, are precisely the states that could be expected to gain in population shares because their large minority populations are traditionally thought to be disproportionately missed by the census. These counter-intuitive adjustments to state population shares proposed following the 1990 census indicate that correlation bias is a major source of inaccuracy in census adjustment based on a mini-census. Much of the population missed in the traditional census is also missed in the mini-census. See Brown 1998 at 6-9; David A. Freedman & Kenneth W. Wachter, *Planning for the Census in the Year 2000*, 20 EVALUATION REV. 355, 367 (1996) (hereinafter "Freedman & Wachter 1996").

From its 1990 mini-census, the Bureau calculated that 804,000 black males had been missed in the traditional census—534,000 less than the Bureau estimated from demographic analysis, indicating that the Bureau was underadjusting for males (presumably because even the mini-census was substantially undercounting them). By contrast, the Bureau calculated that 716,000 black females had been missed in the traditional census—218,000 more than the Bureau estimated from demographic analysis, indicating that the mini-census was substantially overadjusting for black females. Brown 1998 at 7 (summarizing Bureau data). Assuming that the undercounted black

<sup>16</sup> If the 1990 census count had been adjusted, the ten states losing the largest share of the population because of adjustment would have been (in order): Pennsylvania, Ohio, Massachusetts, Michigan, Illinois, Indiana, Wisconsin, New York, New Jersey, and Connecticut. Brown 1998 at 6-8. It is hard to understand why adjustment should have cost those states population share while leaving effectively unchanged the population shares of Idaho, Delaware, Montana, Hawaii, Mississippi, Kentucky, Nevada, Wyoming, Arkansas, Oklahoma, Alaska, Utah, South Dakota, Vermont, Oregon, and North Dakota.

males were disproportionately living in the Northeast would explain the relatively large loss of population share Northeastern states would have suffered as the result of adjustment to the census count in 1990. *Id.*

#### 4. *Incorrect Matching*

Matching records is "a very complex process" combining "elements of survey design, interviewing, matching, imputation, mathematical modeling and professional judgment." CAPE Report at 5. Illegible handwriting, incomplete information, use of aliases by immigrants and fugitives, and different spellings of foreign names can all make accurate record matching difficult. See Darga, "Gnats and Camels," at 9.

Mismatching records is a major source of error in correcting for an estimated undercount in the census. In 1992, for example, the Bureau's CAPE Committee directed "expert matchers" to review record matching for 104 blocks, constituting 2% of the 1990 PES mini-census. Those expert matchers identified enough matching errors for those 104 blocks to reduce the estimated *national* undercount from 1.7% to 1.6%. CAPE Report at 20. The identified matching errors from only 2% of the 1990 mini-census have erroneously increased the *national* population estimate by 248,718 people ( $= .001 \times$  the unadjusted 1990 census count of 248,718,301). The extent of matching errors in the remaining 98% of the mini-census sample could not be estimated. *Id.* at 18-20. Even more matching errors can be expected in the 2000 census because it will limit searching to a single block.

#### C. Small Errors in the ICM Have a Large Impact on the Census Count

That matching errors in 2% of the census blocks in the 1990 mini-census erroneously increased the estimated 1990 undercount by almost 20% and increased the estimated population of the United States by almost 250,000



people indicates the exaggerated effect that small errors in the adjustment process can have. Kenneth Darga, in testimony to the House Subcommittee on the Census last May, provided another striking example of the exaggerated impact of sampling and nonsampling errors in the 1990 mini-census.

It is a basic demographic fact that the number of girl and boy children born is almost exactly equal (100/105). The Bureau's statistical sampling in 1990, however, produced wildly improbable and wildly varying estimates of the extent to which the traditional census had underreported male and female children aged 1-10 for 18 different demographic post-strata, as shown in the table attached as an appendix.<sup>17</sup>

Darga chose the 1-10 age group "because there is no obvious reason to expect householders to mis-report their young male children at a significantly different rate from their young female children." Darga, "Gnats and Camels," at 11. In each of these 18 post-strata, however, the estimated underreporting of boys and girls differed by more than ten percentage points. More surprising still, it showed

no discernible pattern. Sometimes the adjustment for boys is higher, but sometimes the adjustment for girls is higher; in one place black renters have a higher adjustment for boys, but in another place they have a higher adjustment for girls; in some places the gender discrepancy for whites is similar to the gender discrepancy for blacks, but in other places it is the opposite; sometimes one race category in a

<sup>17</sup> These adjustment factors, corresponding to the percentage of undercount determined from the mini-census, are "raw." The Bureau in 1990 used various formulas to "smooth" them to "minimize the effect of sampling error." CAPE Report at 8. The assumptions on which the smoothing technique was based added its own errors, however. *Id.* The table illustrates the remarkable degree of obvious error even at the level of these post-strata.

large city has a higher adjustment for boys, but another race in the same city has a higher adjustment for girls. It is not surprising when signs of estimation error are visible for small components of the population in small geographic areas, but here we see apparently arbitrary adjustments for even the largest population groups in some of the largest cities and across entire regions. Thus, the significant adjustment factors in [the table] suggest a high level of measurement error rather than the high level of precision required for an adequate estimate of undercount.

*Id.* at 12-13.

Small, undetected errors resulting from sampling and nonsampling error in the mini-census result in much larger errors when they are used to "correct" the traditional census count.

### III. APPROVAL OF THE CENSUS BUREAU'S PLAN IS ILLUSORY

The Bureau reported to Congress that its proposed use of statistical sampling was "the *only* solution" to the increasing inaccuracy and increasing cost of the census. J.A. 54 (original emphasis). The Bureau asserted that its use of statistical sampling was supported by "a scientific consensus" and "had been endorsed by three [National] Academy [of Sciences] panels and by numerous other organizations." J.A. 83. The Bureau specifically referred to endorsements by the American Statistical Association, the American Sociological Association, the General Accounting Office, and the Inspector General of the Department of Commerce. *Id.*

In fact, those "endorsements" are largely illusory. They ignore the details of the Bureau's plan and also ignore demonstrated problems with implementing it. After assessing "a massive amount of data" and "additional research," the Bureau's own high-level CAPE Committee

decided in 1992 that, even with refinements, the kind of statistical sampling that the Bureau plans for the 2000 census would not produce results as accurate as a traditional census below the state level. Even at the state level, the CAPE Committee did not think that the adjusted count would be more accurate for every state. CAPE Report at 1-2. The Committee feared that problems with the Bureau's plan "might never be solved" and that "a full adjustment based on such a system might never be possible." *Id.* at 32, 34.

What the American Statistical Association endorsed was the use of sampling generally, which it found "broadly applicable to census taking."<sup>18</sup> However, the Statistical Association also said, in language the Bureau chose not to quote: "The specific design of a sample in a particular setting depends on the particular problem being addressed. In complex situations such as the census, the detailed sample designs require careful analysis by people skilled and experienced in census taking." *Id.* at 6. The Statistical Association did no such careful analysis. When the Statistical Association incorporated the general conclusions of its "Blue Ribbon Panel" into an amicus brief submitted below, it took "no position . . . on the details of any proposed use of statistical sampling in the 2000 census." *Id.* at 1.

Even the reports from the National Academy of Sciences are "generally theoretical rather than empirical, normative rather than descriptive." Freedman & Wachter 1996 at 371. For example, the 1994 Academy report acknowledged "controversy" and "lively debate" about problems with the Bureau's proposed use of statistical

<sup>18</sup> Amicus Brief of the American Statistical Association, submitted below, at 7 (physically incorporating the report of "the ASA Blue Ribbon Panel," from which the *Report to Congress* quotes). The Foundation agrees with the Statistical Association that "it is not necessary to count every household and every person in the country in order to draw conclusions about the country." *Id.*

sampling to correct for undercounting in the census. PANEL TO EVALUATE ALTERNATIVE CENSUS METHODS, NATIONAL RESEARCH COUNCIL, COUNTING PEOPLE IN THE INFORMATION AGE 109, 120 (Duane L. Steffey & Norman M. Bradburn, eds., 1994). It nevertheless concluded that this use of sampling "*may well lead to substantially better estimates.*" *Id.* at 371 (emphasis added). It did not, however, address the evidence from the 1990 census that using such statistical sampling might well lead to worse estimates, especially at the local level.

The 1995 Academy report acknowledged that the census is "the only practical source" for the detailed data required "at the smallest possible geographic level, namely the census block" in order to support apportionment and to "permit legislative districts to be drawn by combining blocks to meet court-mandated criteria for equal populations across districts and appropriate representation of minority groups under the Voting Rights Act." PANEL ON CENSUS REQUIREMENTS IN THE YEAR 2000 AND BEYOND, NATIONAL RESEARCH COUNCIL, MODERNIZING THE U.S. CENSUS 22 (Barry Edmonston & Charles Schultze, eds., 1995).<sup>19</sup> The report acknowledged that using statistical sampling to correct for undercount would involve increasingly "coarse" adjustments "as geographic detail becomes smaller" and that accordingly there was "fervent debate among demographers and statisticians about the best methods to be used for completing the census count for small geographic areas." *Id.* at 100. It concluded: "further work on the census methods to be used for small-area estimates is needed before a decision should be made." *Id.* This is hardly a ringing endorsement.

As "further work" was done, the Academy appears to have abandoned the position that the census was the only

<sup>19</sup> Appendix E to this report, "State and Local Needs for Census Data," sets out in detail why "[s]mall-area census data are essential to state and local government agencies." *Id.* at 273-89 (quotation from 274).



practical source for the detailed information required for apportionment and redistricting set out so clearly in the 1995 report. Its 1997 report acknowledged that at the block and block-cluster level, using statistical sampling can *decrease* the accuracy of the census by introducing more errors than it removes. PANEL TO EVALUATE ALTERNATIVE CENSUS METHODOLOGIES, NATIONAL RESEARCH COUNCIL, PREPARING FOR THE 2000 CENSUS 11 (Andrew A. White & Keith F. Rust, eds., 1997). The Academy, however, asserted that increasing error at the block level did not matter because those errors would cancel each other out for larger geographical areas. It said:

The important point to note here is that for the counts for census blocks, the level of sampling error is, relatively speaking, not an appropriate criterion for judging the quality of the census. Although block counts may contribute to the congressional redistricting process, for example, it is important to keep in mind that the results in a redistricting process are the counts of the congressional districts that are eventually created . . . .

*Id.* at 12. The Academy this time was simply wrong. The accuracy of census counts at the block level is an essential criterion for judging the quality of the census, as the Academy recognized in its 1995 report. It is no endorsement of statistical sampling to say that redistricting based on erroneous census information resulting from statistical sampling does not matter because the errors that led to new districts with new boundary lines will eventually be offset by other sampling errors from within the new district. The boundaries that determine a congressional district depend on data from census blocks. Moreover, even at the district and state levels, the more important nonsampling errors do not tend to cancel each other out, as sampling errors do. The 1997 report also ignores the needs of state and local governments enumerated in the 1995 report.

An assessment by the Inspector General of the Commerce Department in December 1997—after the *Report to Congress* but describing issues that had long been debated—pointed to two among several areas related to the use of sampling to correct for undercounting where “significant research questions have not yet been answered”: *First*, the results of the post-census survey introduced “increasingly error-prone estimates for small localities and in particular for block-level data”; and *second*

the assumption that members of demographic subgroups share a probability of being missed in the census, called the homogeneity assumption, limits the accuracy of the estimates. The ICM survey estimates a person’s chances of being undercounted based on only a few characteristics. In reality a person may be missed for many diverse reasons. Therefore, the survey offers only an approximation of who is undercounted. The bureau examined several techniques for addressing this problem. Only one showed promise, and it has serious unresolved mathematical questions. Therefore, the bureau will be forced to address this important issue with a tool that may not be fully evaluated and tested before implementation.

1997 Inspector General’s Report at 14.

The fact is that the Bureau proposes to apply statistical sampling in an unprecedented way that produced bizarre results in 1990 and can be expected to do so again in the 2000 census.

#### CONCLUSION

The Bureau’s plan is an untested experiment that is unlikely to produce accurate results at the local or national level. The Bureau’s own CAPE Committee recognized in 1992 that problems with the Bureau’s plan “might never be solved” and that “a full adjustment based on such a system might never be possible.” CAPE Report at 32, 34. There is good reason to believe that those problems

have still not been solved. As the Inspector General of the Commerce Department concluded at the end of 1997, the Bureau's statistical sampling plan raises "significant research questions" that "have not yet been answered." 1997 Inspector General's Report at 14.

Respectfully submitted,

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## APPENDIX

Region	Area Type	Tenure	Race	Adjustments	
				Male	Female
Pacific	Non-Central Cities	Renter/ Owner	Asian/Pacific	+ 5%	+ 17%
Mid Atlantic	Central Cities in New York City PMSA	Renter/ Owner	Asian/Pacific	+ 25%	+ 9%
East North Central	Central Cities in Metro Areas w/Central City > 250K	Owner	Black	+ 26%	+ 15%
Pacific	Central Cities in Los Angeles PMSA	Owner	Black	+ 28%	+ 8%
Mid Atlantic	Central Cities in New York City PMSA	Owner	Black	+ 0%	+ 23%
South Atlantic	Central Cities in Metro Areas w/Central City > 250K	Renter	Black	+ 26%	+ 16%
Pacific	Central Cities in Los Angeles PMSA	Renter	Black	+ 20%	+ 10%
Pacific	Non-Central Cities	Renter/ Owner	Black	+ 31%	+ 6%
Mid Atlantic	Central Cities in Metro Areas w/Central City > 250K	Renter/ Owner	Hispanic (except black)	+ 2%	+ 16%
Mid Atlantic	All Central Cities	Renter/ Owner	Hispanic (except black)	+ 14%	+ 2%
West South Central	Central Cities in Houston, Dallas, & Forth Worth PMSA	Renter/ Owner	Hispanic (except black)	+ 8%	+ 19%
South Atlantic	All Non-Metro Areas & All Non-Central Cities	Renter/ Owner	Hispanic (except black)	+ 9%	+ 22%
West South Central	Central Cities in Houston, Dallas, & Forth Worth PMSA	Renter	White, Native Am. & Asian/Pacific except Hisp.	- 5%	+ 11%
East North Central	Central Cities in Metro Areas w/Central City > 250K	Renter	White, Native Am. & Asian/Pacific except Hisp.	+ 21%	+ 4%
East North Central	Central Cities in Metro Areas w/Central City > 250K	Renter	White, Native Am. & Asian/Pacific except Hisp.	- 4%	+ 14%
West South Central	Central Cities in Houston, Dallas, & Forth Worth PMSA	Renter	White, Native Am. & Asian/Pacific except Hisp.	+ 7%	+ 21%
South Atlantic	Central Cities in Metro Areas w/Central City > 250K	Renter/ Owner	White, Native Am. & Asian/Pacific except Hisp.	+ 10%	- 1%
South Atlantic	Non-Metro Areas Except Places > 10K	Renter/ Owner	White, Native Am. & Asian/Pacific except Hisp.	+ 3%	+ 16%

(19)

No. 98-404

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In The  
**Supreme Court of the United States**  
October Term, 1998

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UNITED STATES DEPARTMENT OF COMMERCE, et al.  
*Appellants,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, et al.  
*Appellees.*

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**On Appeal from the United States District Court  
For the District of Columbia**

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**BRIEF OF NATIONAL REPUBLICAN LEGISLATORS  
ASSOCIATION,  
LOCAL GOVERNMENT COUNCIL,  
DR. ALAN HESLOP  
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

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## INTERESTS OF AMICI CURIAE <sup>1</sup>

**The National Republican Legislators Association** is a voluntary group of elected members of state legislatures. Its membership includes representatives from legislative chambers across the nation. Its interest is in the fair and equitable distribution of political authority within the United States and within the boundaries of each state. Many of its members are active participants in the crafting of representational districts. Its redistricting part of the apportionment process is dependent upon the timely receipt of accurate data from the Census Bureau.

**The Local Government Council** is a non-profit, non-partisan, educational organization dedicated to promoting pro-business, free-market, and traditional values public policies. LGC is associated with over 1,700 individuals from 38 states who share a desire to keep government small and support Constitutional principles. LGC's interest is that local government officials have access to timely and accurate census data, that can be used for redistricting for counties, cities, towns, school districts and other local government jurisdictions.

<sup>1</sup> All parties in this matter have consented to the filing of this Amicus Curiae Brief, as evidenced by letters of consent lodged with the Clerk. This brief was not authored in whole or in part by any counsel for a party. No person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

**Dr. Alan Heslop** is the Director of the Rose Institute of State and Local Government at Claremont McKenna College. He is the Rose professor of government at the same institution. He has written extensively on issues affecting representation and has also served as a consultant for numerous jurisdictions regarding the drawing and redrawing of district lines. He is closely familiar with the ways in which census data are used in computerized districtings and redistrictings and has experience in working with congressional representatives, state legislators and municipal officials in such processes.

Both as a political scientist and as someone concerned about the future health of local government, Dr. Heslop has taken a keen interest in proposals for different kinds of census sampling and enumeration techniques. In this work, Dr. Heslop has become very familiar with the uses and misuses of different kinds of census information.

### **SUMMARY OF THE ARGUMENT**

We recognize the Constitutional imperative of the federal census as a means by which peaceful and periodic transfer of political power is accomplished in America. The Framers of the Constitution knew about the temptations to accumulate and hold political power and provided numerous institutional safeguards to keep such temptations away from participants in our governing process. The very real potential exists that the numbers from the 2000 census for the apportionment process, including redistricting, may be subject to manipulation to further partisan goals. We view with alarm a plan to deliberately not count at least 10% of the nation's population and to add virtual persons to, or subtract real persons from, the census count, as being violative of Article 1, § 2, U.S. Constitution.

The terms reapportionment and redistricting were used by this Court and Congress synonymously throughout the 1950s, 1960s, and 1970s. Therefore, the issue before this Court is not only the method that the Census Bureau may use to determine the population data for the division of Congressional representatives between the states, but also the population data for representation districting. A historical and practical reading of the Census Act leads inevitably to the conclusion that data for the redistricting part of the reapportionment process must not be based on estimates and polls.

Furthermore, we are gravely concerned that, under the Census Bureau's plan, those responsible for drawing the boundaries of representative districts within each state and other political subdivisions, including these Amici, will be unable to create legitimate representative districts, either in a timely fashion or of equal population as mandated by a generation of this Court's reapportionment jurisprudence.

### **I. THE FRAMERS OF THE CONSTITUTION WERE AWARE OF THE POTENTIAL FOR MANIPULATION OF CENSUS COUNTS FOR POLITICAL GAIN AND INSTITUTED SAFEGUARDS TO ASSURE AN OBJECTIVE ENUMERATION.**

While we can never know with absolute certitude what each of the Framers of our Constitution had in mind when the phrase "actual enumeration" was used, their probable understanding of the history of census taking provides the logical starting point for any analysis.



Historically, a census had been undertaken by one of two basic means. First was an effort to catalogue every person, or at least persons meeting certain criteria, e.g., males over a certain age. The second general means of determining the size of the population was to count a small subset of the total population in order to estimate the size of the overall population.<sup>2</sup>

The notion of institutionalizing a complete nominal enumeration,<sup>3</sup> or a head count, was not unknown at the time of the Constitutional Convention. However, it was not standard practice for many governments. "It is commonly thought that the idea, as well as the execution, of an enumerative census was started by the United States in 1790. The truth is that the idea of a complete enumerative population census was then by no means novel." Wolfe at 357.

"The earliest medieval record of any importance is the Domesday Survey made in England at the order of William the Conqueror in 1083-1086." *Id.* at 361. The "names of property owners were recorded" in the famous Domesday Book. *Id.*

<sup>2</sup> A. B. Wolfe, *Journal of the American Statistical Association*, Vol. 27: December 1932, 357-369 *passim*, (hereinafter "Wolfe"). See also *City of New York v. Department of Commerce*, 739 F. Supp. 761, 762 (E.D.N.Y., 1990) (discussing how Christianity was "founded in a stable - thanks to the census").

<sup>3</sup> "A population census, in the correct, and specific sense, is a direct enumeration, preferably on a set date, and by name of each individual in the census area. A census so made is both enumerative and nominal." Wolfe at 357.

"Lively interest in quantitative data on population was evinced during the eighteenth century in France and also in England. In both countries, suggestions for national enumerations began to be made by the middle of the century." *Id.* at 366. More than a century before the Convention in 1662, John Graunt, known as a father of statistical sampling, published the first population estimate of London based on statistical analysis.<sup>4</sup> "In 1753, Thomas Potter introduced a bill in Parliament providing for a general enumeration." Wolfe at 368.

A Frenchman, LaPlace, proposed a method in 1786 of "taking a precise population, but only at a few given places in a country."<sup>5</sup> His method of counting was by enumeration, "carefully enumerating at a given time, the inhabitants of several communities." Accuracy and statistical adjustment were key concerns. LaPlace confirmed that the accuracy of the ratios used to estimate the overall population would be "more accurate as the enumeration is more extensive." Stigler at 164. This method was used in France, in 1802, but was abandoned later, being replaced by full counts nationwide, due in part to the concern about the representativeness of the sample communities. Stigler at 164.

<sup>4</sup> Philip Kraeger, "New Light on Graunt," *Population Studies, Journal of Demography*, Vol. 42, No.1, (Mar. 1988) p.129.

<sup>5</sup> Stephen M. Stigler, *The History of Statistics - The Measurement of Uncertainty before 1900*, Belknap Press, Cambridge, Mass., (1986) p. 164 (hereinafter "Stigler").

In America, before the Constitutional Convention, "several of the states composing the young Republic had formed the habit of making frequent enumerations of their inhabitants during their existence as colonies."<sup>6</sup> An awareness of the difference between different forms of censuses, statistical estimates and an actual enumeration can therefore be reasonably assumed.

The method that many American states used prior to the Philadelphia Convention to determine their population is unclear. Such censuses were apparently undertaken without sufficient procedural safeguards, as evidenced by the disparities in the numbers available at the Convention.<sup>7</sup> The potential for manipulation of the process by the individual states was on the minds of several delegates.

The Framers provided for a number of institutional safeguards against manipulation "of the respective numbers." First, the Constitution provided that an institutionally neutral entity, the Federal Government, undertake the actual enumeration. Edmund Randolph, of Virginia, observed that

<sup>6</sup> A Century of Population Growth, Bureau of the Census, Washington, DC (1909), p.2.

<sup>7</sup> Several sets of population numbers and contribution quotas were available at the Convention. Max Farrand, ed., The Records of the Federal Convention of 1787, Revised Edition in Four Volumes, Yale University Press, New Haven (1966) (hereinafter "Farrand"). Farrand at I:190; I:573-4; III:253; IV:160-1. Estimates for colonial censuses were "based on materials ranging from relatively complete enumeration... to fragmentary data..." Historical Statistics of the United States, 1789-1945, Bureau of the Census, Washington, DC. (1949) p. 16. The debates reflect several discussions about the numbers and attempts to alter the initial representation of particular states. Farrand at I:561, II:63, II: 623-24.

"the census must be taken under the direction of the general legislature [Congress]. The states will be too much interested to take an impartial one for themselves." Farrand at I:580. However, this precaution alone did not provide a sufficient safeguard in the minds of the delegates because "... the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree, on the disposition, if not on the cooperation of the states ...".<sup>8</sup>

To solve this problem of having an interested party involved in preparing the numbers by which political power would be apportioned, the Framers' second step was to link representation with direct taxation. This coupling formed an important disincentive to the states against manipulation of the numbers. As Madison observed, "[w]ere their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests which will control and balance each other and produce the requisite impartiality."<sup>9</sup>

As stated by another member of the convention, "by connecting the interest of the states [representation in the House] with their duty [payment of direct taxes], the latter would be sure to be performed." Farrand at I:197 (emphasis added). However, since the adoption of the Sixteenth Amendment in 1913, whatever financial disincentive had

<sup>8</sup> Jacob E. Cooke, ed., The Federalist, Wesleyan University Press, Middletown, CT (1961) p. 371, (hereinafter "the Federalist").

<sup>9</sup> The Federalist at 371-2.



existed at the state and local level was lost to the footnotes of history.

The Framers' third affirmative step to limit the potential for political manipulation was the "actual enumeration" requirement. The appellants essentially seek to remove this critical Constitutional safeguard -- the actual count of inhabitants -- from the Framers' plan. Freed from the requirements of an actual enumeration or count, the census could become just a tool to further the political ends of its designers, the political party that controls the executive branch.

The Solicitor General contends that "actual enumeration" is not meant to restrict Congress' method of determining the number of persons to an actual count. The term census rather than "actual enumeration" was used throughout most of the Convention. The term "actual enumeration" was introduced to the convention from the Committee of Style in the final week of the Convention.

The Solicitor General states that "[n]o delegate suggested that the Committee of Style's use of the words 'actual enumeration' was intended to affect the scope of Congress's authority..." See Appellants' Brief at 44. There is no record of the debates for the Committees of Style or Detail. Generally, the records of the convention are silent on this issue of drafting history, but the argument in the Solicitor General's brief makes an unsavory soup of conclusions from the rocks and waters of silence and a lack of records.

Considering the clearly expressed concerns of the Framers about the manipulation of population numbers, it is logical to conclude that the term "actual enumeration" was purposefully used. In light of the different types and forms of censuses likely known to the Framers, it is equally as logical to conclude that actual enumeration was meant to mandate an actual count of inhabitants.<sup>10</sup> The interpretation the Solicitor General proposes would render the words "actual enumeration" as meaning exactly the same as census.

When the language of the draft Constitution was changed from the more general term "census" to the more specific term "actual enumeration," standard interpretative analysis demands that the change be given meaning.<sup>11</sup> What is clear from the Federalist Papers and the debates at the Philadelphia Convention is an overriding concern for a permanent and precise standard for representation that would afford objectivity and avoid conjecture.

<sup>10</sup> A contemporaneous definition of the term also supports this conclusion. The word "enumeration" is defined in Samuel Johnson's 1773 dictionary as "[t] act of numbering or counting over; number told out." 1 Samuel Johnson, *A Dictionary of the English Language* (1773).

<sup>11</sup> See e.g., *United States v. Wilson*, 503 U.S. 329, 336 (1992) (noting the "familiar maxim that when Congress alters the words of a statute, it must intend to change the statute's meaning") (Citing *Russello v. United States*, 464 U.S. 16, 23-24 (1983)).

## II. THE COMMERCE DEPARTMENT'S PLAN TO CONDUCT A LIMITED POPULATION COUNT AND TO STATISTICALLY ADJUST THAT RESULT CREATES THE POTENTIAL FOR SIGNIFICANT MANIPULATION

The Commerce Department's plan for the 2000 census to deliberately not count 10% of the nation's population and to adjust the initial numbers to reflect expected norms is subject to manipulation for political ends. This potential for manipulation is as clear in the 1990's as it was in the 1780's.

The Secretary of Commerce, in his statement announcing his decision to not adjust the 1990 census results, pointed out the multiple scenarios which would have been possible by adjustment of the 1990 census counts:

Consider the results of two possible adjustment methods that were released by the Census Bureau on June 13, 1991. The technical differences are small, but the differences in results are significant. The apportionment of the House of Representatives under the selected scheme moved two seats relative to the apportionment implied by the census, whereas the modified method moved only one seat.<sup>12</sup>

<sup>12</sup> Statement of Secretary Robert A. Mosbacher on Adjustment of the 1990 Census, (July 15, 1991. Federal Register, vol 56:140, p.33582, (hereinafter "Mosbacher"). "One expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods." *Id.* at 33582.

Adjustment, being based upon modeling,<sup>13</sup> by its very nature implies that assumptions are made. Assumptions themselves imply logical deductions, but also subjectivity. Subjectivity in such a volatile setting, with political stakes so high, will result in a succumbing to partisan temptation, absent the repeal of the nature of Man. "What is unsettling, however, is that the choice of the adjustment method selected by the Bureau officials can make a difference in apportionment, and the political outcome of that choice can be known in advance." Mosbacher at 33582.

In 1991, the Co-Chairman of the Special Advisory Panel established by the Secretary concluded that:

*It is certainly not hard to imagine that such a process, especially when cloaked in the mysteries of statistical complexity, could easily be corrupted and manipulated, particularly if it should become accepted practice and not subject to rigorous public examination....*<sup>14</sup>

<sup>13</sup> Modeling has been defined as "using a simplified or idealized description or conception of a particular system, situation, or process... that is put forward as a basis for calculations, predictions, or further investigations. Oxford English Dictionary Second Edition, Clarendon Press, Oxford (1989) p. 941.

<sup>14</sup> V. Lance Tarrance, Jr., Co-Chairman, Special Advisory Panel, Summary Report to the Secretary of Commerce (June 14, 1991) p. 29 (emphasis in the original) (hereinafter "Tarrance"). See also Mosbacher at 33599.



There are numerous different ways to sample and adjust the census. These different ways will distribute political power differently between various groups. Each potential sampling and adjustment design has its own set of debatable assumptions, but predictable outcomes. The appellants have argued that we must trust the impartial expertise of the Census Bureau and the Department of Commerce. Yet, the Framers of our Constitution wisely put their faith in strict structural limits and not in any belief in the benevolent nature of man. "[F]rom the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the contrary, we know they will always when they can rather increase it." Farrand at 1:578-9.

Amici pray for the indulgence of the Court to consider the operational elements of the Commerce Department's plan for the 2000 census. It is important for this Court to understand exactly what this plan will entail for the 2000 census and how it differs significantly from the 1990 census and all other prior censuses in U.S. history.

Under the Commerce Department's plan, the 2000 census will become only a partial census completed through estimation and adjusted through polling and modeling. The estimation will attempt to account for the Bureau's intentional undercount of 10% of the housing units and the modeling will attempt to adjust for the under counting and over counting which differs among population subgroups.

As part of a consent decree in litigation before the 1990 census was taken, there was an option before the Secretary of Commerce either to adjust, or to let stand, the actual enumeration numbers. Following the actual enumeration, the Secretary carefully reviewed the evidence

regarding an adjustment of the 1990 census and, in July 1991 decided not to adjust.

This review option is a critical distinction between the Department of Commerce's plan for the 2000 census and the 1990 census. For the 2000 plan there will not be even an attempt at a 100% headcount which might be adjusted retroactively. The only physical count for 2000 will be up to 90% in each census tract. If the Department of Commerce is permitted to implement its plan, the 1990 census will have been the last full census conducted to apportion political power in our national republic.<sup>15</sup>

### III. THE PROHIBITION ON SAMPLING IN TITLE 13 SECTION 195 ALSO APPLIES TO THE DISTRICTING PART OF THE APPORTIONMENT PROCESS

Apportionment is a two-step process involving an initial allocation of representatives followed by the secondary construction of districts. Apportionment without districting is incomplete. This was and still is the widely prevalent understanding of apportionment. Often, this Court, lower federal courts, state legislatures, scholars and Congress used

<sup>15</sup> The Solicitor General argues that the House of Representatives' interpretation of actual enumeration as requiring an actual count "cannot be reconciled with historical practice" and that each person was not always individually personally counted. See Appellants' Brief at 47. There is one element of these historical practices which distinguishes them fundamentally from those proposed by Appellants. Aside from an isolated emergency case after the 1970 census, in each of these non-individual headcount practices, there has always been some physical, tangible evidence found to account for each individual number.

the term apportionment and redistricting synonymously through the 1950's, 1960's 1970's and 1980's.

The term apportionment has been used in the inclusive sense by this Court to encompass districting throughout the development of this Court's reapportionment jurisprudence. The apportionment revolution was, of course, a redistricting revolution, starting with Wesberry v. Sanders, 376 U.S. 1 (1964), where this Court invalidated the Georgia "apportionment" of congressional districts. This Court has consistently used the term apportionment to include districting, by directly and unequivocally referring to the drawing of district boundaries as apportionment. While each of the decisions in the revolution ostensibly ruled on "apportionment," in fact, the decisions dealt with the districting part of the apportionment process.<sup>16</sup>

Also, numerous lower Federal Court cases evidence that the common usage of the term "reapportionment" incorporated "redistricting."<sup>17</sup> Federal courts properly have

<sup>16</sup> See Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm'n for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth Gen. Assembly Of Colo., 377 U.S. 713 (1964). See also White v. Weiser, 412 U.S. 783, 784 (1973); Gaffney v. Cummings, 412 U.S. 735, 735 (1973); Davis v. Bandemer, 478 U.S. 109, 113 (1986); Karcher v. Daggett, 462 U.S. 725, 727 (1983); Shaw v. Reno, 509 U.S. 630, 633 (1993).

<sup>17</sup> See, e.g., Burns v. Gill, 316 F. Supp. 1285, 1293 (D. Haw. 1970) (approving of a "two-tier apportionment plan" whereby all representatives and senators initially would be apportioned among basic island units and thereafter district lines would be drawn within the islands themselves); Taylor v. McKeithen, 499 F.2d 893, 910-911 (5<sup>th</sup> Cir. 1974) ("[n]ot the (continue)

not distinguished apportionment and districting and in fact, have historically subsumed redistricting within the overall process of apportionment.<sup>18</sup>

Another way to understand the analogous usage of these terms is to view them from the perspective of state legislators. Today 47 states use some form of the term "apportionment" in their statutes that deal with the drawing of representative districts.<sup>19</sup> Of course, none of these states

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least of the problems that would be created by representative apportionment is that the cartographer...cannot draw his meandering lines"); Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 688 (D.C. Cir. 1991) (citing regulation that defined redistricting as "any effort, directly or indirectly, to participate in the revision or reapportionment of a legislative, judicial or elective district at any level of government, including the timing or manner of the taking of a census"); Johnson v. Mortham, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (finding only a "technical difference" between reapportionment and redistricting).

<sup>18</sup> "Fundamentally, redistricting versus reapportionment is a distinction without a difference," Gorin v. Karpan, 775 F. Supp. 1430, 1443 (D. Wyo. 1991). "Congressional Districts were malapportioned." Dixon v. Hassler, 412 F. Supp. 1036, 1038 (WD Tenn.), affirmed, 429 US 934 (1976); "Apportionment of seats in the House of Representatives," Boyer v. Gardner, 540 F. Supp. 624, 625 (D.N.H. 1982); "reapportionment between censuses..." Westwego Citizens for Better Gov't v. Westwego, 906 F.2d 1042, 1045-46 (5<sup>th</sup> Cir. 1990); "the County has adopted its current reapportionment plan..." stating that fragmentation has been a "goal of each redistricting scheme since 1959", Garza v. County of Los Angeles, 918 F.2d 763, 773 (9<sup>th</sup> Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

<sup>19</sup> Only Illinois, Kentucky and Washington use the term redistricting to the exclusion of apportionment.



actually apportion representatives between governmental units. They construct representational districts. State legislatures continue to use the terms interchangeably. The National Conference of State Legislatures (NCSL) has a subgroup of legislators interested in these issues, that only two years ago changed its name from the Reapportionment Task Force to the Redistricting Task Force.

A listing of the most preeminent scholars with their works shows the use of the term apportionment interchangeably with, or to include, districting. Probably the most generally recognized work in this area is Democratic Representation: Reapportionment in Law and Politics by Robert G. Dixon, Jr. (hereinafter "Dixon"). Clearly Dixon's view is that redistricting is a subset of reapportionment.<sup>20</sup>

<sup>20</sup> See Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics, Oxford University Press, New York, (1968) p. 3 (noting "reapportionment revolution"). Robert B. McKay, Reapportionment: The Law and Politics of Equal Representation, Twentieth Century Fund, New York (1965) p. 6 ("In short, it appears that the apportionment and districting functions in the state legislative process will be merged into a single task to be performed by each legislature. "). Bruce E. Cain, The Reapportionment Puzzle, University of California Press, Berkeley (1984) p.xi; (noting that [r]eapportionment is a murky and dimly perceived process for most political observers"). ("The district lines drawn by reapportionment...") *Id.* at 1.; Stephen J. Thomas, "The Lack of Judicial Direction in Political Gerrymandering: An Invitation to Chaos Following the 1990 Census," Hastings Law Journal, Vol.40:1067 (July 1989) p. 1067 ("Gerrymandering may be accomplished through a variety of methods, including malapportionment."); Gordon E. Baker, "The Unfinished Reapportionment Revolution," Political Gerrymandering and the Courts, Bernard Grofman, ed., Agathon Press, New York (1990) p. 25 ("the problem of malapportionment in the form of vast population disparities among districts.") David L. Anderson, "When Restraint Requires Activism: Partisan Gerrymandering and the Status (continue)

The congressional understanding of the interchangeability of apportionment and redistricting is reflected in the passage of P.L.94-171, which provided for the distribution of block-level population data for districting, 13 U.S.C. §141 was amended in 1975 to include "legislative apportionment" as part of the section heading.

Title 13 U.S.C §195 not only prohibits sampling for apportionment, but redistricting as well. The addition of specific redistricting language in 13 U.S.C. §141(e)(2) does not affect this analysis. The Census Act was amended in 1976 in substantial part to allow for a mid-decade census to provide timely statistical information for allocation of funding. Congress would have perceived no need to amend 13 U.S.C. §195 to expressly expand the prohibition on "sampling" data for apportionment, because there can be little doubt that Congress in 1976 would have understood 13 U.S.C. §195 to already prohibit "sampling" data in redistricting.

When analyzed in the context of this general understanding of apportionment, it is reasonable to view the 13 U.S.C. §195 prohibition on the use of sampling for the purposes of apportionment, as applying with equal force to the apportioning of representatives among the states (apportionment) *and* to the revision of representation districts (redistricting).

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Quo Ante," Stanford Law Review, Vol. 42:1549 (July 1990) (noting "that the Court should withdraw from reapportionment reform").

Section 13 U.S.C. §195 prohibits data from sampling for congressional apportionment. As the above review indicates, this use of the term apportionment most logically extends to redistricting as well. Congress intended sampled data to be used in only two limited circumstances: (1) to allow the so-called "long form" data to be collected from a sample of the entire population; and (2) to allow the use of sampling for a mid-decade census to provide more current data for federal aid distribution in between censuses. 13 U.S.C. §195 was amended to strengthen the intent of Congress to use sampling for supplementary data. 13 U.S.C. §141 was amended to allay fears that any more recent data, no matter what the level of accuracy, could be used to challenge any apportionment or districting scheme.<sup>21</sup> Read together, it is clear that Congress intended that sampled data be used in neither step of the apportionment process.

<sup>21</sup> Congressional Record, 94<sup>th</sup> Congress (April 7, 1976) p. 9786-9795, passim.

The silence of 13 U.S.C. §195 with respect to the term redistricting reflects the interchangeability of the terms at the time. Indeed, this interconnection explains the silence. While the concepts of reapportionment and redistricting share a common base of population data, the timeframes are distinct. 13 U.S.C. §141(e)(2) addresses the time element of both events. The language clarified that the mid-decade census, based upon sampling, could not be used either to invalidate the current apportionment or to enable challenges to current redistricting plans.

#### **IV. FOR CONGRESS TO HAVE PROHIBITED THE USE OF SAMPLING IN STATE-LEVEL APPORTIONMENT, BUT TO HAVE ALLOWED ITS USE AT THE DISTRICTING LEVEL WOULD BE IRRATIONAL.**

Whatever impact adjustment would have on the apportionment of political representation among states, the impact on the apportionment process *within* states would be much larger. The reasons behind this statement require only the most basic understanding of sampling or polling as a statistical theory.

Many national surveys or polls commonly note that the reported percentages are plus or minus 3-4% for national analysis. However, estimates of sampling error for lower levels of geography will be much higher. Whereas several thousand respondents may be representative of the nation as a whole, to provide a representative cross-section of even a state in a national survey requires many more respondents.



As a basic statistical principle, the relative degree of sampling/polling error increases as the size of the population universe decreases.<sup>22</sup>

The use of sampling to improve the accuracy of the census, if valid at all, can only be true for the highest level of geography. As one moves down the geographic hierarchy, the numbers become less accurate. There is basically an inverse relationship between the population size of a unit (state, county, city or block) and the accuracy of the data from sampling.<sup>23</sup> It was exactly this concern which was a basis for the Secretary's concern for the 'distributive accuracy' rather than 'numerical accuracy' in his decision to not adjust the 1990 Census.<sup>24</sup> Confidence that any sampling/poll will accurately represent the actual numbers, which would have been obtained by a full traditional count, at the block level disappears.<sup>25</sup>

<sup>22</sup> For example, an error of one person out of 100 persons is a 1% error. An error of one person out of 10 persons is a 10% error.

<sup>23</sup> Note that the Bureau's plan involves the use of sampling in two phases, the Non-Response Follow-Up (NRFU) and the Integrated Coverage Measurement (ICM). While the ICM phase is designed to improve accuracy, the Bureau does not claim that accuracy is a concern for NRFU, which is primarily "to save time and money." General Accounting Office, GAO/GCD-97-142, Progress Made on Design, But Risks Remain (July 1997) p. 44, (hereinafter "GAO"). This element of the plan for 2000 ignores the fact that the most accurate data are obtained directly from respondents, which can be only collected through the traditional means of personal contact. GAO at 26.

<sup>24</sup> Mosbacher at 33584.

<sup>25</sup> The Secretary expressed a further concern about adjustment for small areas. "As the population units get smaller, including small and  
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A judicial rule of statutory construction is that it is presumed that a legislative body enacts rational legislation.<sup>26</sup> Given the disproportionally larger impact on redistricting within a state, it would be absurd to prohibit the use of sampling for apportioning seats between the states, but to allow it for representative redistricting. The only rational analysis is that if sampling/polling cannot be legally used for the division of congressional seats between states, it cannot be used for the subset of that process, representative redistricting within a state, where its problems and their effects are indisputably larger.

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medium sized cities, the adjusted figures become increasingly unreliable." Mosbacher at 33583.

<sup>26</sup> "Legislation in question is presumed to be rational[.]" Peterson v. Lindner, 765 F.2d 698, 705 (7th Cir. 1985) (citing Hodel v. Indiana, 452 U.S. 314, 322 (1980)).

**V. THE COMMERCE DEPARTMENT'S PLAN FOR THE 2000 CENSUS IS SO COMPLEX AND SUBJECT TO INEVITABLE INADVERTENT ERROR THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT LEGALLY SUFFICIENT CENSUS DATA WILL NOT BE AVAILABLE FOR THE DRAWING OF REPRESENTATIVE DISTRICTS IN TIME FOR THE 2001 AND 2002 ELECTIONS**

Experience provides evidence of this problem. Review the situation following the 1990 census. The Bureau given the luxury of time to review its 1990 post enumeration survey (PES)<sup>27</sup> revised the national undercount rate downward in July 1992. "As a result of an error in computer processing, the estimated national overcount rate of 2.1% was overstated by 0.4%. ...[a]fter making other refinements and corrections, the national undercount is now estimated to be about 1.6%." Report of the Committee on Adjustment of Postcensal Estimates, Bureau of the Census, Aug. 1992, p. 15. This overstatement revolved around coding errors for only 2,000 households in the 1990 post enumeration survey. However, the impact of this error, from these few households, was enormous.<sup>28</sup> It affected the estimate of the national undercount by about a million persons.

This inadvertent error, which reduced the national undercount rate from an estimated 2.1% to 1.6%, would have changed the apportionment of congressional seats affecting

<sup>27</sup> The PES was a large poll of 165,000 housing units taken after the 1990 Census designed to measure the coverage of the census.

<sup>28</sup> Howard Hogan, "The 1990 Post-Enumeration Survey Operations and Results." Journal of The American Statistical Association, Vol. 88:423 (September 1993) p. 1047, 1054.

several states. For the reasons mentioned above, the effect of this error would have been greatly magnified in the redistricting part of the apportionment process.

The modeling schemes proposed by appellants for the 2000 plan will result in each housing unit in the nationwide survey having an impact far beyond its own infinitesimal share of 1 out of 100+ million housing units. Under a traditional count, the total population for any level is merely the aggregate of the data from all housing units. Under appellants' plan, the totals for every jurisdiction are impacted by the representativeness of the sample used in the poll. Bad samples produce flawed numbers.

Considering the complexity of the appellants' plan, with its nationwide survey component much larger than 1990, it is reasonable to conclude that the Bureau can not implement this *Rube Goldbergesque* machine in a timely manner without some significant errors creeping into the process. As one prominent statistician recently observed, "[t]he results of adjustment are highly dependent on somewhat arbitrary technical decisions. Furthermore, mistakes are almost inevitable, very hard to detect, and have profound consequences." Lawrence D. Brown, et al., Statistical Controversies in Census 2000, Technical Report, Department of Statistics, U.C. Berkeley (October 1998) p. 18.



**VI. STATE AND LOCAL OFFICIALS CHARGED WITH THE CREATION OF NEW REPRESENTATIVE DISTRICTS WILL BE UNABLE TO CREATE DISTRICTS WHICH MEET A GENERATION OF THIS COURT'S EQUIPOPULOUS REAPPORTIONMENT JURISPRUDENCE WITH THE USE OF ESTIMATION AND POLLING DATA**

Both the estimation and modeling phases will be based upon sampling, or to use the more colloquial term - polling techniques. These will have known error rates. Sampling or polling error results from the fact that only a part of the entire population is asked questions. The principal issue for any poll is whether the sample chosen is an appropriate sample that is representative of the entire population.

The use of polling and estimation in the census results in a measurable error. The error reflects the fact that the sample which was used was only one of many possible samples and may not have been representative of the entire universe of persons. This error measurement quantifies the degree of difference between the numbers generated by a polling technique versus numbers generated by a complete count. The smaller the number of persons in the sample or poll, the larger the potential for a greater percentage of error.

Herein lies a problem with respect to the drawing of district boundaries and equal representation. This Court has repeatedly made clear that in order to comply with Article 1, § 2, U.S. Constitution states must draw congressional districts as nearly equal in population "as is practicable."<sup>29</sup>

<sup>29</sup> Wesberry, 376 U.S. at 8.

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This Court and lower federal courts have invalidated many congressional redistricting plans with relatively small population variances. See e.g., Karcher v. Daggett, 462 U.S. 725, 742 (1983) (striking down a New Jersey plan with a population deviation of 0.6984%). Following the 1990 census, 10 states enacted congressional apportionment plans with a population deviation of 0 or 1 person<sup>30</sup> and although this Court has generally afforded states greater latitude in creating state legislative districts, states are still constitutionally required to make "an honest and good faith effort" to create population equality among districts. Brown v. Thomson, 462 U.S. 835, 842 (1983). Given this Court's limited tolerance for population deviation, if the data used to construct the districts have a known error rate larger than permitted population deviations, how is the line drawer to proceed?

The results of the 1995 Test Census held in Oakland, California are illustrative of the problem. For a small census block in Oakland, a reported estimate of 100 persons would mean that a full count would have found between 72 and 128 persons, an error due to sampling of 28%.<sup>31</sup> What is the population figure to be used for city council redistricting?

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<sup>30</sup> Another six states only missed this status by a very few persons. 1990 Census Population and Housing Profile: Congressional Districts of the 103rd Congress, Bureau of the Census, Washington, D.C., CPH-L117, (n.d., 1993) p. 1-8.

<sup>31</sup> This estimate reflects a 95% confidence level. 1995 Census Test, Census Block Level Data, CD Rom, Bureau of the Census, Washington, DC, CD95-CENTEST (August 1996) passim.

For its test Census, the Bureau calculated the average error for the census blocks as follows: 18.3% Paterson, New Jersey, 12.6% for Oakland, and 25.2% for selected Parishes in Northwestern Louisiana. These error rates were termed "quite substantial" by the Bureau. Martha Farnsworth Riche, Report to Congress, The Plan for Census 2000, revised August 1997, p. 45-8, (hereinafter "Riche").

The relevant level for error analysis is not just the completed congressional district, as this Bureau now maintains.<sup>32</sup> If one is crafting local representation districts, each census block's error must be considered.<sup>33</sup> The census block is the building block for most representative districts around the nation. It is also the lowest common denominator for the entire census. If the lowest level data are suspect, equal population local representation districts cannot be drawn with this data.<sup>34</sup> Local officials will be faced with the use census block data for their city, town or township, which they may know, from direct personal observation, are wrong.

<sup>32</sup> Riche at 46-7.

<sup>33</sup> "Margins of error are critical for small areas." Commerce News, CB91-214 (June 5, 1991). Adjustment would be implemented at the block level.

<sup>34</sup> These error rates may be compounded in individual representative districts. The error rate in some blocks may reflect an undercount, in others an overcount. These errors might "balance out" nationally if the underlying assumptions and the execution are correct. They will not "balance out" in representative districts. Redistricting is not a random process. Blocks are frequently specifically assigned to a district based upon demographic characteristics. Districts are typically small enough and sufficiently homogenous that they may well be composed substantially of blocks with the same kind of error, magnifying the population deviation.

The Summary Report to the Secretary of Commerce before the decision to not adjust in July 1991, stated the problem as follows: "[t]he hard fact is that the numbers produced by the present adjustment procedures are only *estimates* and, at very small geographical levels, such as city blocks, estimates will not be 'accurate' and may not be even 'closer to the truth'." Tarrance at 10. (emphasis in the original).

The report emphasized the inherent problems with using sampled data. "Statistical sampling procedures produce good results only when the sample is large; the smaller the sample, the less accurate the estimate." Noting that many users of census data rely on data for small geographic areas, the report stated that this would be "where the ship called accuracy or 'closer to the truth' will founder on the shoals of reality." *Id.*

It takes no active imagination to foresee the numerous pieces of litigation that will be spawned by using sampling in the redistricting process. How is a line drawer to reconcile these significant error rates? What data should any court use when reviewing future redistricting cases?<sup>35</sup> The appellants' plan for 2000 will aggravate uncertainty in the already complex and litigious apportionment process. The timeframe under which new districting plans must be enacted is extremely tight in several states holding fall 2001 legislative elections. These plans must be finalized a few short months

<sup>35</sup> While equal representation has frequently been measured by overall population deviation among districts, alternative perspectives are possible. See *Garza v. County of Los Angeles*, 918 F.2d 763, 778 (1990), Judge Kocinski concurring and dissenting.



after the block-level data first become available in April of 2001 and include states which must submit plans for pre-clearance under Section 5 of the Voting Rights Act.

An "actual enumeration," based upon physical evidence of the existence of persons, and not conjectural estimates,<sup>36</sup> provides the best available data for the creation of representational districts. Millions of persons will be counted as some fraction above or below a whole person.<sup>37</sup>

### CONCLUSION

Amici share the concern of the Framers that partisan manipulation of the census should be avoided. The federal census is the largest participatory event of our American government. The goal should be to encourage every American to be counted, not discounted or left uncounted.

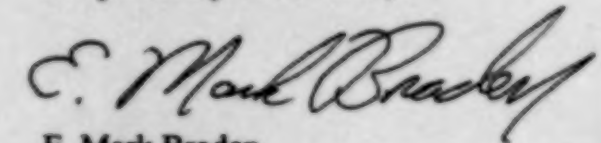
Amici pray this Court in the interest of judicial economy, as suggested by the Solicitor General, to resolve the Constitutional issues with respect to the "actual enumeration" of the "respective numbers." If the present litigation is resolved solely on the grounds of statutory construction and is limited solely to the apportionment of congressional seats between the states, there will be even more litigation following the 2000 census with respect to the redistricting part of the reapportionment process. Clearly,

<sup>36</sup> This Court has held that "if a state does attempt to use a measure other than total population or to 'correct' the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner." *Karcher* 462 U.S. at 732, n. 4 (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 534-35 (1969)).

<sup>37</sup> Mosbacher at 33636.

this Court would not wish to create a circumstance where the legal sufficiency of the data used for the creation of thousands of representative districts across the nation, at every level of political geography, is a continuing unanswered question.

Respectfully submitted,



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November 3, 1998

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No. 98-404

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1998**

**UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,  
Appellants,**

**v.**

**UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,  
Appellees.**

**On Appeal from the United States District Court  
for the District of Columbia**

**BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED  
EDUCATIONAL FOUNDATION, AMERICAN CONSERVA-  
TIVE UNION, AMERICANS FOR TAX REFORM,  
ASSOC. OF AMERICAN PHYSICIANS AND SURGEONS,  
CAPITOL WATCH, CITIZENS FOR JUDICIAL REFORM,  
COALITION OF VIRGINIA TAXPAYERS, FRONTIERS  
OF FREEDOM INSTITUTE, INDEPENDENT WOMEN'S  
FORUM, PATRICK PIZZELLA, DR. DON RACHETER,  
60 PLUS ASSOCIATION, SMALL BUSINESS SURVIVAL  
COMMITTEE, and TOWARD TRADITION AS *AMICI CURIAE*  
IN SUPPORT OF U.S. HOUSE OF REPRESENTATIVES**

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## QUESTIONS PRESENTED

*Amici curiae* address the following issue only:

Whether the Census Act prohibits the Secretary from employing statistical sampling in arriving at a population figure for the purpose of apportioning Representatives among the States.

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## INTERESTS OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.<sup>1</sup> While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to ensuring that governments at all levels adhere strictly to federal constitutional norms. To that end, WLF has appeared before this Court as well as other federal and state courts in cases involving alleged government violation of the U.S. Constitution. *See, e.g., Phillips v. Washington Legal Found.*, 118 S. Ct. 1925 (1998).

The Allied Educational Foundation, the American Conservative Union, Americans for Tax Reform, the Association of American Physicians and Surgeons, Capitol Watch, Citizens for Judicial Reform, Coalition of Virginia Taxpayers, Frontiers of Freedom Institute, Independent Women's Forum, 60 Plus Association, Small Business Survival Committee, and Toward Tradition are all non-profit groups that share an interest in limited and accountable government, and a government that adheres to constitutional norms.

Patrick Pizzella is a citizen of Virginia. Dr. Don Racheter is a citizen of Iowa. Both are concerned that their constitutional right to a fair apportionment of the U.S. House of Representatives, based on an "actual Enumeration" of residents of this country, is being threatened by

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.



Appellants' plan to employ statistical sampling in connection with the 2000 Census.

All of the *amici curiae*, other than the Frontiers of Freedom Institute and the Small Business Survival Committee, filed a brief in this case in support of the U.S. House of Representatives in the district court.

All 15 of the *amici curiae* are very concerned that Appellants' plan to employ statistical sampling in connection with the 2000 Census dramatically increases the risk that census figures will be manipulated for partisan political purposes. *Amici* believe that the mere risk of such manipulation may result in a loss of public confidence in the fairness of the decennial census and a breakdown in consensus regarding the reapportionment process.

*Amici* submit this brief in support of Appellee House of Representatives, with the written consent of all parties. The written consents are on file with the Clerk of the Court.

## INTRODUCTION

The conduct of a census to be used in apportioning seats in the U.S. House of Representatives is a matter of tremendous importance to the American system of government. Public support for our democratic institutions cannot be maintained unless citizens in all 50 States believe that their States have been allotted their fair share of seats. It is important not only that the apportionment censuses be conducted as fairly as possible, but also that the general public perceive that they are being conducted fairly.

Our nation's first 21 decennial censuses largely met those goals. Each was conducted as an actual "headcount"; *i.e.*, numbers were tallied only after identifiable individuals were determined to reside at specific locations within a State. It has been recognized since the 1790 Census that a headcount is bound to miss some residents, and that residents sharing certain characteristics (*e.g.*, rural residents) are missed at disproportionate rates. Nonetheless, the headcount method of counting has been maintained, both because it is thought to be generally accurate (and has been getting increasingly accurate) and because it is effective in preventing manipulation of census figures for partisan purposes.

Appellant U.S. Department of Commerce ("Commerce") has announced plans to conduct the 2000 Census in a manner that is fundamentally different from the headcount method that has been employed since 1790. Appellants will not even attempt to enumerate all those residing in the United States. Instead, the Census Bureau will attempt to count only 90% of all residents. Once that goal is reached, it will employ a variety of statistical sampling techniques to arrive at what it believes will be a reasonable estimate of the population of each State. Appellants assert that the population figures derived in this manner will be more accurate than those that could be derived from a headcount.

*Amici* do not dispute that the State population totals derived through a statistical sampling methodology are *potentially* more accurate than those that could be achieved through a headcount (albeit there will never be a definitive answer regarding that issue if Appellants are permitted to proceed as planned, because there will be no complete headcount in the 2000 Census). Nonetheless, *amici* oppose

Appellants' statistical sampling methodology because it dramatically increases the risk that census figures will be manipulated for partisan political purposes. The mere risk of such manipulation, which would be virtually impossible to detect, may well result in a loss of public confidence in the fairness of the decennial census and a breakdown in consensus regarding the reapportionment process.

Both the Framers (when drafting the Constitution) and Congress (when adopting census legislation) sought to avoid the possibility that the decennial census and apportionment decisions could be tainted by partisan consideration. That concern is reflected in the language of the Constitution and the census statutes, which prohibit use of statistical sampling in deriving census figures that will be used for apportionment.

*Amici* fully concur with the House of Representatives' arguments regarding the proper interpretation of relevant constitutional and statutory language. Rather than repeating those arguments here in full, however, *amici* devote a considerable portion of this brief to a discussion regarding the significant dangers of political manipulation inherent in Defendants' plan for carrying out the 2000 Census. Those dangers underscore both the need to enforce the headcount requirement imposed by the Constitution and federal law, and the need to resolve this issue now rather than after a constitutionally defective census has been completed.

#### STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case contained in the brief of Appellee U.S. House of Representatives. *Amici*

nonetheless include a lengthy history of the conduct of decennial censuses in this country; *amici* believe that a full historical account is vital to understanding Congress's intent in adopting the Census Act provisions whose meaning is in dispute.

The requirement for a decennial census derives from the U.S. Constitution. A cornerstone of the agreement that gave birth to our national government, the census requirement was designed to ensure that both direct taxes and political power were shared equitably among those from all regions of the country:

Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers. . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such manner as they shall by Law direct.

U.S. Const. art. I, § 2, cl. 3.

One of the Framers' primary concerns was that the decisions respecting the allocation of direct taxes and political power not be subject to partisan manipulation. Thus, for example, the requirement that a new census be conducted every ten years was designed "to ensure that entrenched interests in Congress did not thwart or stall needed reapportionment." *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992)(citing 1 M. Farrand, *Records of the Federal Convention of 1787* ("Federal Convention"), at 571, 578-588 (rev. ed. 1966)).



The Framers were also very concerned with the method by which each State's population was computed. Their chief concern was that the population count be as accurate as possible; and they recognized that partisan manipulation was the *principal force* that could lead to inaccurate counts. Thus, conduct of the census was placed into the hands of federal government officials, rather than leaving State officials (who might have reason to doctor the results) responsible for ascertaining their own population. *Id.* at 580. The Framers also decided that the population would be determined by an "actual Enumeration," rather than by using one of the various types of estimating methodologies commonly used to determine population in Colonial times. *Id.* at 578-79.

The objection to the use of estimates was not that they were thought *inherently* inaccurate. Many of the eighteenth century State population estimates (based on poll tax records, militia rolls, and similar data) were accepted as accurate, and were roughly in line with the population totals calculated in the 1790 Census.<sup>2</sup> Rather, the objection was that relying on estimation failed to provide a "permanent and precise standard" that was immune to manipulation. *Id.* Indeed, a primary reason that the Framers rejected wealth as the measure of direct taxation and congressional apportionment was that wealth could not

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<sup>2</sup> The Constitution provided that, until the first decennial census could be completed, seats in the U.S. House of Representatives were to be apportioned among the thirteen States as specified in Art. I, § 2, cl. 3. That apportionment, which apparently was based on existing State population estimates (see Congressional Research Service, *Sampling for Census 2000: A Legal Overview*, (Sept. 1997) at 2-3), proved to be closely in line with the apportionment that followed the 1790 Census.

be measured nearly as objectively as could population. *Id.* at 603.<sup>3</sup>

**The Census Since 1790.** Each of the decennial censuses conducted between 1790 and 1990 employed (at the direction of Congress) a "headcount" methodology, whereby enumerators tabulated individuals actually identified as living in United States. The first five censuses were conducted pursuant to the 1790 Census Act, which appointed federal marshals to conduct a "just and perfect enumeration and description of all persons." Similarly, the Act of March 26, 1810 stated that the enumeration was to be made "by an actual inquiry at every dwelling house, or the head of every family within each district, and not otherwise." Ch. 17, 2 Stat. 564.

Substantially similar requirements appeared in subsequent census legislation. The Act of May 23, 1850, ch. 11, 9 Stat. 428, 430 (as amended by the Act of August 30, 1850, ch. 43, 9 Stat. 445, the "1850 Census Act"), which governed the seventh, eighth, and ninth censuses, similarly required that the census takers make "a personal visit to each dwelling house, and to each family," and generate responses "by inquiries made of some member of each family, if anyone can be found capable of giving the

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<sup>3</sup> Under the Articles of Confederation, the costs of maintaining the national government had been allocated among the States "in proportion to the value of all land within each State, . . . estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint." Articles of Confederation, Art. VIII. Because political power under the Confederation was not allocated on the basis of population (each State had an equal vote in legislative matters (Art. V, § 4)), there had been no need to conduct a national population count during the Confederation period.

information, but if not, then the agent of such family." The Acts that governed the following eight censuses provided similar instructions to census takers.<sup>4</sup> This requirement was carried over in 13 U.S.C. § 25(c) when the current Census Act was codified in 1954.

The Secretary of Commerce considered and rejected proposals that the 1990 Census cease its reliance on "headcount" methodology and instead employ large-scale adjustments based on statistical sampling, finding that reliance on statistical sampling would "abandon a two hundred year tradition of how we actually count people." *Wisconsin v. City of New York*, 116 S. Ct. 1091, 1097 (1996) (quoting *Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population* ("Mosbacher Statement"), 56 Fed. Reg. 33582 (July 22, 1991)).

**Collecting Information Beyond Population Figures.** Throughout the 1800's, there developed a large demand for information about the American population beyond simply the number of citizens within each jurisdiction. Thus, census takers began to be directed to ask a series of questions in addition to the number of members of each household. In 1840, for example, census takers sought answers to an extended list of questions, including

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<sup>4</sup> See Act of March 3, 1879, ch. 195, 20 Stat. 473, 475, as amended by Act of April 20, 1880, ch. 57, 21 Stat. 75; Act of 1889, ch. 319, 25 Stat. 760, 763; Act of March 3, 1899, ch. 419, 30 Stat. 1014, 1018; Act of July 2, 1909, ch. 2, 36 Stat. 1, 5; Act of March 3, 1919, ch. 97, 40 Stat. 1291, 1296; Act of June 18, 1929, ch. 28, 46 Stat. 21, 22 (governing the 15th, 16th, and 17th censuses).

questions on mental illness, occupations, and literacy. William S. Holt, *The Bureau of the Census: Its History, Activities and Organization* 11 (The Brookings Institution 1929). The 1840 census was widely criticized as inaccurate, with many attributing the inaccuracies to citizens' unwillingness to answer questions thought too numerous or intrusive. *Id.* at 13 (citing S. Rep. 146, 28 Cong., 2d Sess. (1840)).

As the number and scope of such questions grew throughout the 19th century, they came to be known as the "second census," and were the subject of considerable controversy because of their known tendency to decrease census accuracy. Margo J. Anderson, *The American Census: A Social History* 59 (1988). In order to satisfy the insatiable demand (both from government and the private sector) for information about the population without making the census impossibly cumbersome, the government began to rely on "statistical sampling." *Id.* at 180-87. Census officials learned how to derive reasonably accurate information about the population as a whole based on answers given by only a small percentage of census respondents. The federal government's need for detailed information about the population became particularly great after the 1930s -- when it began using census data to allocate federal funds (*id.* at 179) -- a need that could not have been satisfied if census takers had been required to obtain the necessary information from every census respondent.

In 1940, the Census Bureau formalized the practice of using "long form" census reports, whereby a small segment of the public was asked detailed questions for purposes unrelated to population estimation. Bureau of the Census, *The History, Operations, and Organization of the Bureau*



of the Census 6 (1946) (long forms sent to one out of every 20 people). In 1957, Congress amended the Census Act at the request of the Secretary of Commerce, adopting 13 U.S.C. § 195 to make clear that the Secretary was authorized to use statistical sampling in this manner. But Congress made clear that that authority did not extend to use of sampling to calculate the population for purposes of apportioning congressional seats. See Pub. L. 85-207, § 14, 71 Stat. 481, 484 ("Except for the determination of population for apportionment purposes, the Secretary may . . . authorize the use of . . . 'sampling' in carrying out the provisions of this title"). In sum, while the government has employed sampling throughout this century in connection with the "second census," that practice has always been viewed as consistent with the government's simultaneous strict adherence to headcounts when it comes to counting the population for apportionment purposes.

**Undercounts.** From the 1790 Census to the present, the federal government has recognized that some residents are missed in a "headcount" census. As the Supreme Court stated in *Wisconsin*:

Although each [of the 20 decennial censuses in U.S. history] was designed with the goal of accomplishing an "actual Enumeration" of the population, no census is recognized as having been wholly successful at achieving that goal. <sup>2/</sup>

<sup>2/</sup> Indeed, even the first census did not escape criticism. Thomas Jefferson, who oversaw the conduct of that first census in 1790 as Secretary of State, was confident that it had significantly undercounted the young Nation's population. See

C. Wright, *History and Growth of the United States Census 16-17* (1900).

*Wisconsin*, 116 S. Ct. at 1094 & n.2.

Moreover, this "undercount" has always been understood to be greater among some segments of the population than in others. For example, Jefferson recognized following the 1790 Census that those living in remote areas were more likely to have been missed than those living in cities. This admitted differential undercount nonetheless did not cause federal officials to abandon the "headcount" methodology in favor of statistical adjustments to compensate for the undercount. Since 1940, the Census Bureau has recognized that the undercount tends to be somewhat higher among some racial and ethnic groups (particularly blacks and Hispanics) than among others. Despite suggestions to the contrary by the Appellants and their supporters, this undercount differential has not changed markedly since first identified in 1940; and there is every reason to believe that in each of our 21 decennial censuses, the undercount was not uniform among all races and ethnic groups.

While decennial censuses have become increasingly complex and expensive, they also have become increasingly accurate. The 1980 Census and the 1990 Census, which both employed traditional headcount methodology, are generally conceded to have been the most accurate in the nation's history. See, e.g., Mosbacher Statement, 56 Fed. Reg. at 33582. Post-census analysis indicates that in each

of those two censuses, more than 98% of the U.S. population was counted.<sup>5</sup>

Nonetheless, jurisdictions with the largest concentrations of members of groups thought to suffer the highest undercount levels have for several decades been asking the Census Bureau to make statistical adjustments to the headcount, in order to compensate for the undercount. In 1980, the Carter Administration declined requests to adjust the 1980 Census headcount, not only because there was little assurance that the adjustments would improve accuracy but also because the Constitution and federal law prohibited such adjustments based on statistical sampling. *Census Undercount Adjustment: Basis for Decision*, 45 Fed. Reg. 69366 (Oct. 20, 1980).<sup>6</sup> In 1991, the Bush Administration similarly declined requests to adjust the 1990 Census headcount. Commerce Secretary Mosbacher cited as a principal reason for his decision the danger that permitting adjustments to the headcount would open the census to partisan manipulation. Mosbacher Statement, 56 Fed. Reg. at 33600-33603. The decision not to adjust the 1990 Census based on statistical sampling was upheld by the Supreme Court in *Wisconsin*.

**Appellants' Plan for the 2000 Census.** In a report issued in July 1997, the Census Bureau announced that it had abandoned its 200-year-old practice and will not

<sup>5</sup> Those figures rebut the oft-heard argument that headcounts may have been feasible in the past but are becoming increasingly less so as the population expands.

<sup>6</sup> The federal census laws have not changed in any material respects since this 1980 decision.

employ a headcount methodology in connection with the 2000 Census.

The plan for the 2000 Census calls for mailing out census forms to a comprehensive list of households nationwide similar to mailings in the past three censuses. The plan thereafter deviates sharply from past censuses. Instead of an intensive effort to follow up with *all* households that failed to respond to the initial mailing (as occurred in the past), the Census Bureau will contact only a statistical sample of households that did not respond. The size of that sample will vary depending on the percentage of households within each census tract who responded to the initial mailing. The goal of the follow-up sample is to ensure that information has been obtained from 90% of households within each census tract. For example, if the initial response rate were 85%, then a sample consisting of one in three nonresponding households would be contacted in order to bring to 90% the percentage of those responding ( $85\% + (1/3 \times 15\%) = 90\%$ ); similarly, if the initial response rate were 40%, then five out of six nonrespondents would be contacted. On the basis of the demographic composition of the sample households surveyed in this "nonresponse follow-up," the Census Bureau will estimate the number and demographic composition of individuals within the 10% of households not contacted.

Once the "nonresponse follow-up" has reached its 90% goal, the Census Bureau intends to begin its Integrated Coverage Measurement (ICM) phase: a second estimate of the population based on a survey of 750,000 households in 25,000 census blocks spread across all 50 States. The 25,000 blocks (out of seven million blocks nationwide) will *not* be randomly selected; rather, they will be "carefully . . . selected to include blocks from all areas of the country,



with all race and ethnic groups, from all sizes of towns and cities, and from rural areas." Bureau of the Census, *Report to Congress -- The Plan for Census 2000* (rev. Aug. 1997) at 29. In simplified form, the objective of the ICM is to compare the initial census count in those 25,000 blocks to the count obtained during the intense door-to-door survey conducted during the ICM. That comparison will be used to calculate what the Bureau believes to be the likelihood that individuals with specific demographic characteristics (for example, urban black males age 21 to 35 who rent their living quarters) were not counted in the initial census count. That likelihood (referred to by the Bureau as the "estimation factor") will then be multiplied by the number of individuals within each census tract known to share those same demographic characteristics and who were identified in the initial census count, in order to arrive at an adjusted population total for each census tract. *Id.* at 31-32.

**Challenge to the Census Bureau's Plan.** In February 1998, the U.S. House of Representatives (the "House") filed this suit challenging Commerce's plan to use statistical sampling (as described above) rather than a traditional headcount in connection with the 2000 Census. The House asserted that the plan violates a prohibition against such statistical sampling contained in 13 U.S.C. § 195 and also violates the requirement of Art. I, § 2, cl. 3 of the Constitution that a decennial census used for apportionment purposes must be an "actual Enumeration."

On August 24, 1998, the district court granted the House's motion for summary judgment. Jurisdictional Statement Appendix ("Jur. App.") 1a-67a. The court determined that Commerce is prohibited from employing statistical sampling in conducting an apportionment census,

by virtue of 13 U.S.C. § 195. Jur. App. 48a-59a. The court determined that reading such a prohibition into § 195 was the most logical interpretation of the words in the statute, and was also supported by the legislative history preceding adoption of the current statutory language in 1976. The court determined that the prior version of § 195 had unambiguously prohibited statistical sampling in the congressional apportionment process; the absence of evidence that Congress in 1976 thought it was radically altering § 195 led the court to conclude that Congress did not intend its 1976 changes in § 195's language to eliminate that prohibition. *Id.* at 54a-59a.

The district court also rejected Commerce's argument that another provision of the Census Act, 13 U.S.C. § 141(a), affirmatively authorizes statistical sampling in the congressional apportionment process. Jur. App. 59a-64a. In light of its statutory findings, the court declined to address the House's alternative argument that Commerce's contemplated use of statistical sampling violated Article I, § 2, cl. 3 of the Constitution. Jur. App. 64a.

### SUMMARY OF ARGUMENT

13 U.S.C. § 195 is susceptible to only one reasonable interpretation: it forbids use of statistical sampling in connection with any census data to be used "for apportionment purposes." Any other interpretation of the statute would render the quoted words meaningless. Commerce is correct that the House's interpretation of § 195 results in some of the language in § 195 being repetitive of some of the language in 13 U.S.C. § 141. But *amici* fail to see how that result renders the House's interpretation unreasonable. *Amici* believe it highly plausible that if Congress felt strongly about encouraging the Census

Bureau to use statistical sampling for nonapportionment purposes, it would include words of encouragement in *both* § 141 and § 195, even if one such reference would have been legally sufficient.

A major concern of both the Framers of the Constitution (in adopting the "actual Enumeration" requirement) and of Congress in adopting § 195 was to prevent the census from being subject to partisan manipulation. *Amici* believe that the plan adopted by Defendants for the 2000 Census will vastly increase the census's susceptibility to such manipulation. As Commerce Secretary Mosbacher recognized in rejecting a proposal to adjust the 1990 Census figures, there are numerous alternative, equally plausible methods one could adopt in utilizing statistical sampling to adjust census figures. Because the political ramifications of many such alternatives will be known before one alternative is adopted, the potential for partisan manipulation of census results is significant. Mosbacher Statement, 56 Fed. Reg. at 33585. Moreover, employing statistical sampling dramatically increases the incentives for those being surveyed to craft their responses in such a way as to maximize partisan advantage.

The significant potential for partisan manipulation of census results underscores the need to enforce the head-count requirement imposed by the Constitution and federal law -- imposed for the primary purpose of preventing such partisan manipulation.

## ARGUMENT

### I. THE CENSUS ACT PROHIBITS THE USE OF SAMPLING TO DETERMINE THE U.S. POPULATION FOR PURPOSES OF APPORTIONMENT

The House's statutory claims turn on the proper interpretation of 13 U.S.C. § 195, which provides:

*Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of [Title 13 of the U.S. Code].*

13 U.S.C. § 195 (emphasis added).

*Amici* agree with the House's interpretation of this provision of the Census Act and thus will not repeat here all the arguments advanced by the House in support of its interpretation. Suffice to say that Commerce's interpretation (that the first clause of § 195 merely *permits* the Bureau to dispense with statistical sampling in its apportionment census work but does not *require* it to do so) is not plausible when the Census Act is read as a whole. While the second clause's use of the word "shall" indicates strong congressional support of statistical sampling, Commerce is simply wrong in suggesting that the second clause "mandates" statistical sampling in any situation in which the Bureau would seriously consider not doing so. Rather, the second clause states that sampling "shall" be used *only* when it is "feasible" to do so. Any Bureau decision not to employ sampling presumably would be



based on a Bureau determination that sampling is not feasible, because the time and cost savings inherent in use of sampling make it likely that the Bureau would use sampling for census work whenever it were feasible to do so.<sup>7</sup> Commerce's interpretation of § 195 thus renders the first clause of that statute meaningless. While strongly encouraging use of sampling in at least some settings, the second clause grants the Secretary discretion not to employ sampling *whenever* its use is deemed unfeasible, so the first clause adds nothing if all it means is that the Secretary is not required to use sampling in its apportionment census work.

Appellants insist that Congress's true feelings regarding use of sampling in the reapportionment context are to be found by examining 13 U.S.C. § 141(a), even though that provision makes absolutely no mention of reapportionment census work. *See, e.g.*, Commerce Br. 25-27. They insist that § 195 cannot be interpreted as prohibiting sampling in the reapportionment context because otherwise it would conflict with the terms of § 141(a). They further insist that the district court's interpretation of § 195 was in error because it "disregard[ed] the cardinal rule of statutory interpretation that a statute must be read consistently in order to construe each part or section in connection with every other part or section so as to produce a harmonious whole." Nat'l Korean Br. 22.

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<sup>7</sup> As noted above, the Commerce Department in 1991 determined that it was unfeasible to use statistical sampling to adjust State population figures for the 1990 Census, in part because doing so would increase the danger of partisan manipulation of the census. 56 Fed. Reg. at 33585. The Commerce Department thus was not required to invoke the first clause of § 195 at all, or to address whether adjustments were prohibited by § 195.

But the district court's interpretation of § 195 does *not* place it into conflict with § 141(a). While § 141(a) provides the Secretary with generalized discretion to employ statistical sampling, it does not speak to the use of sampling in the reapportionment context. There is no internal inconsistency within a statute when one provision provides a generalized endorsement of a practice and another provision prohibits the practice in one very specific context.

In sum, the arguments in support of the House's interpretation of § 195 are far stronger than those espoused by Defendants. Particularly when one considers that: (1) there is virtually no doubt that the pre-1976 version of § 195 prohibited use of statistical sampling in connection with determining populations for apportionment purposes; and (2) there is no indication (in either the Census Act or its legislative history) that Congress desired to lift that prohibition when it amended § 195 in 1976, the House's interpretation of § 195 is by far the more plausible.

## II. THERE IS NO EVIDENCE THAT CONGRESSIONAL LEADERS CONTEMPLATED THE SEA CHANGE IN § 195 THAT APPELLANTS ASSERT WAS EFFECTED BY THE 1976 AMENDMENT

Although Commerce contends that the 1976 amendment to § 195 transformed the statute from one that prohibited apportionment sampling to a statute that permitted it at the Secretary's discretion, Commerce makes no effort in its brief to demonstrate that those serving in Congress at the time actually intended such a result. Although various of the Intervenor and supporting *amici* attempt to fill that void, their efforts are ultimately unavailing.

Intervenors Richard Gephardt, *et al.*, contend that in the mid-1970s "Congress was well aware" of the Bureau's use of statistical estimation in the 1970 Census, approved of the use of those methods, and included amendments to the Census Act in 1976 "to conform more closely to the current language and practices used by the Bureau." Gephardt Br. 30-31 & n.20 (citing S.Rep. No. 94-1256, at 6 (1976)). Intervenors have misread the Senate Report. The report specifically identifies the "technical changes" proposed for the purpose of "conform[ing]" the Census Act to "practices used by the Bureau," and neither of the changes relevant to this lawsuit -- the changes to §§ 141(a) and 195 -- appear anywhere on that list. *See* S.Rep. 94-1256, at 3-7. Nor is there any suggestion in any of the hearings, reports, or debates surrounding the 1976 amendment that Members of the 94th Congress had any knowledge whatsoever of the Bureau's limited use of sampling under exigent circumstances in 1970.

Intervenors note that a House Committee, during hearings conduct in 1970, acquired limited knowledge concerning the Bureau's use of sampling in the 1970 Census.<sup>8</sup> Gephardt Br. 31 (citing H.R. Rep. 91-1777 (1970)). But that hearing took place six years before the

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<sup>8</sup> While the report was complimentary of the Bureau's efforts in 1970, it is not at all clear from the subcommittee's report that it understood that the Bureau had made use of sampling to estimate population for apportionment purposes (in violation of § 195), and not simply to double-check coverage. *Amici* note, moreover, that when Bureau Director George H. Brown briefed the subcommittee, he emphasized that "the census is a name-by-name accounting of each dwelling unit or other place of abode for the entire population. It is not an estimate." *See Accuracy of 1970 Census Enumeration and Related Matters: Hearings Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service 7*, 91st Cong., 2d Sess (Sept. 1970).

amendments at issue in this case. The 1970 Census programs that made limited use of sampling were never mentioned in the hearings, reports, or debates surrounding the 1976 amendments, nor were they employed during the 1980 Census.

In an effort to explain the failure of even a single legislator to mention the "repeal" of the sampling prohibition, Intervenors assert that use sampling to produce population figures was simply not that big an issue in 1976, and that it was "anachronistic for the district court to assume that Congress in 1976 could not have meant to give the Census Bureau discretion" to decide whether to employ apportionment sampling. Gephardt Br. 33. Intervenors' contention that apportionment sampling has only recently become a controversial topic is patently incorrect. Indeed, concerns that mid-decade census statistics (which are *not* derived from a headcount) might be used for congressional apportionment and districting prevented passage of legislation authorizing a mid-decade census for more than a decade in the 1960s and 1970s. H. Conf. R. No. 94-1719 at 17. Passage of the 1976 amendments was made based upon express assurances, as set forth in the House Report, that "this legislation will not affect apportionment or districting of congressional seats." *Id.* at 4.

Although Intervenors contend that the hearings held and legislation introduced in 1976-77 to address the prospect of an undercount in the 1980 Census support their view that authority had already been conferred in 1976 to use sampling to adjust census totals (Gephardt Br. 35-36), those subsequent legislative developments support the opposite conclusion. Indeed, during June 1976 hearings conducted to consider the ramifications of the undercount, the Director of the Bureau of the Census testified that it



was the Bureau's "goal" to develop techniques to allow it to provide Congress both "with an enumeration and an estimate . . . of the undercount" so that Congress could decide whether an adjustment of figures was warranted. Hearing at 13-20. Nothing in the Director's testimony indicated a belief that the Bureau had already been granted complete discretion to determine whether to use sampling to adjust population figures.

### III. COMMERCE'S PLAN FOR THE 2000 CENSUS WOULD SIGNIFICANTLY INCREASE ITS SUSCEPTIBILITY TO PARTISAN MANIPULATION

A major concern of both the Framers of the Constitution (in adopting the "actual Enumeration" requirement) and of Congress in adopting § 195 was to prevent the census from being subject to partisan manipulation. *Amici* believe that the plan adopted by Commerce for the 2000 Census will vastly increase the census's susceptibility to such manipulation. The significant potential for partisan manipulation of census results underscores the need to enforce the headcount requirement imposed by the Constitution and federal law -- imposed for the primary purpose of preventing such partisan manipulation.

*Amici* do not mean to impugn the reputation of the Census Bureau's professional staff; *amici* have no information suggesting that the Census Bureau will, in fact, succumb to pressure to manipulate its figures to benefit one political faction or another. However, it cannot be seriously doubted that census figures have long been a hot political issue. The decisions not to use statistical sampling in connection with the 1980 Census and the 1990 Census

led to numerous federal lawsuits, while the decision to use statistical sampling in connection with the 2000 Census has spawned at least two federal court challenges. Not surprisingly, those who supported the 1980 and 1990 challenges generally are on the opposite side of the political fence from those supporting the 2000 challenges. Nor is it surprising that those Members of Congress seeking to intervene as Defendants in opposition to the Republican-controlled House of Representatives are all Democrats. In light of the politically charged atmosphere surrounding the use of statistical sampling, there is a significant danger that its use could undermine public confidence in the census and the reapportionment process.

Moreover, there is little doubt that introduction of statistical sampling into the decennial census process will vastly increase the potential for manipulation, both by those charged with running the census and by those being counted. The potential for manipulation was one of the principal reasons cited by Secretary Mosbacher for declining to use statistical sampling to adjust the "headcount" for the 1990 Census. Mosbacher Statement, 56 Fed. Reg. at 33583, 33585, 33599-33603.

Secretary Mosbacher's concerns are equally applicable to the 2000 Census, given that the ICM is substantially similar to the statistical sampling undertaken in connection with the 1990 Census. He noted, for example:

To calculate a nationwide adjustment from the survey, a series of statistical models are used which depend on simplifying assumptions. Changes in these assumptions result in different population estimates. Consider the result of two possible adjustment methods that were released by the Census Bureau on June 13,

1991. The technical differences are small, but the differences in results are significant. The apportionment of the House of Representatives under the selected scheme moved two seats relative to the apportionment implied by the census, whereas the modified method moved only one seat. One expert found that among five reasonable alternative methods of calculating adjustments, none of the resulting apportionments of the House were the same, and eleven different states either lost or gained a seat in at least one of the five methods.

*Id.* at 33583. Secretary Mosbacher cited three areas where the Census Bureau would need to adopt highly arbitrary adjustment rules that would have a significant impact on apportionment:

- (1) The imputation of matching status (i.e., when will it be determined that an individual identified in the ICM is the same person as an individual identified in the same block during the initial phase of the census, particularly in those numerous instances when available information is incomplete). *Id.* at 33600-601. Rules reducing the number of "matches" would tend to increase the reported undercount.
- (2) Selection of post-strata (that is, the hundreds of demographic categories into which individuals identified during the ICM are to be placed for purposes of calculating undercount adjustments). The process of selecting post-strata is thought by many to have a significant impact on the final adjustment. *Id.* at 33601. One reason for that impact is the basic assumption underlying the

post-stratification methodology: that everyone within a given post-stratum has an identical likelihood of having been contacted during the initial phase of the census. Some of the post-stratification criteria (e.g., Hispanic background) encompass widely diverse groups that are unlikely to have identical group behavioral characteristics.

- (3) Selection of smoothing procedures (the statistical techniques employed to remove some of the effects of random variability in the estimates of the "adjustment factors" or "estimating factors" for the various post-strata, while preserving the meaningful systematic differences between subgroups). *Id.* Smoothing involves three major judgmental decisions: (1) the treatment of "outliers" (extreme variance points that may or may not be eliminated from consideration during smoothing); (2) variance pre-smoothing; and (3) the choice of "carrier variables" (i.e., attributes that are assumed in advance to be associated with low or high undercount rates, and are "held constant" during a linear regression analysis in an attempt to isolate random variation). *Id.* at 33601-602.

In response to these types of criticisms, the Census Bureau has announced plans to "announce and 'lock in' its final set of formulas -- well in advance of the collection of any new data in 2000. Fears that the Census Bureau will collect data in 2000 and then use new formulas designed to achieve some purpose other than the most accurate census possible are completely without foundation." Report to Congress, at 51.



Experience suggests, however, that the Census Bureau will not be able allow its "locked in" formulas to remain unchanged after data collection for the 2000 Census begins. Experience with past censuses suggests that unexpected developments requiring adjustments invariable arise. See Mosbacher Statement, 56 Fed. Reg. at 33600 ("No production of the complexity of the census or the PES [the predecessor of the ICM] can be completely prespecified. There are always unforeseen events that occur and require modification to the plan."); *id.* at 33603 ("It has proved virtually an impossible task to prespecify the adjustment procedure. It is equally impossible to prespecify the Census procedure.") Accordingly, despite the Census Bureau's best intentions, changes in adjustment procedures are going to be required at a date in time when the political ramifications of those adjustments are fully known. Moreover, for some of the choices regarding adjustment methodology, "the political outcome of that choice can be known in advance." *Id.* at 33583. For those choices, no amount of advance "lock-in" can completely guard against political manipulation -- particularly when, as often is the case, the available option are equally plausible.

Commerce is correct that many experts believe that use of the ICM can theoretically lead to a more accurate census than one employing a headcount methodology. But other experts oppose any use of statistical sampling in connection with the 2000 Census, and the principal reason given is the possibility of partisan manipulation. See, e.g., Morris L. Eaton, *et al.*, *Planning for the Census in the Year 2000: an Update*, (Technical Report 484, Dept. of Statistics, U.C. Berkeley, June 19, 1998). The authors concluded, "We believe there is a substantial risk that ICM will degrade rather than improve the quality of census data." *Id.* at 1.

The dangers of partisan manipulation are particular great when one considers that only minor changes in population totals will affect the apportionment process. For example, the Congressional Research Service has determined that if current Census Bureau estimates of 2000 population hold up, Georgia will gain two House seats, while Mississippi will lose one seat. Congressional Research Service, *House Apportionment Following the 2000 Census: Preliminary Projections* (Feb. 17, 1998). However, if Georgia's official 2000 Census population were only 0.1% less than the projection, it would gain only one seat instead of two, while Mississippi would retain its current number of House seats if its population were only 0.1% greater than the projection.

Moreover, even if Census Bureau personnel could resist all temptation to engage in political manipulation of its adjustment program, it is unlikely to be able to control manipulation by outsiders. Consider the following:

(1) If one is interested in maximizing political power for one's neighborhood and for those who share one's demographic characteristics, then it is almost surely the best strategy not to respond to the initial census mailing. The Census Bureau currently intends to begin its nonresponse follow-up activities four weeks after the initial mailing and to continue those activities for about six weeks. If one is randomly selected for nonresponse follow-up, one should be sure to provide information at that time. Since the Census Bureau cannot hope to reach 100% of those selected for nonresponse follow-up, those who do provide information will by definition be overrepresented in the sample. If one is not selected for nonresponse follow-up

within 10 weeks of the initial mailing, then one should go ahead and mail back the initial census survey.<sup>9</sup>

(2) The possibilities for manipulation by respondents are far greater at the ICM stage. While the Census Bureau will attempt to keep secret the identity of its 25,000 ICM blocks, that "secret" is likely to be widely known to local government officials just as soon as door-to-door surveys begin, if not before. While local government officials are likely to have little incentive to support the initial phase of a census they know will be subject to a subsequent undercount adjustment (Mosbacher Decision, 56 Fed. Reg. at 33584), they will have a huge incentive to drum up 100% participation in every block identified to them as an ICM block. Those local governments that are able to identify their ICM blocks stand to reap huge rewards in terms of undercount adjustments.

(3) The preceding opportunities for partisan manipulation assume complete honesty among respondents. If respondents are willing to lie, the possibilities for manipulation expand exponentially. It is estimated that each person added to the census at the ICM level will result in 360 phantom bodies -- each with demographic characteristics identical to the additional person -- being added to the census count. Thus, there is a far greater incentive to lie to census personnel in a statistically adjusted census than there is in a traditional headcount.

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<sup>9</sup> The Census Bureau currently plans to accept and tabulate mailed responses received after the nonresponse follow-up has begun. See, GAO, 2000 Census: Preparations for Dress Rehearsal Leave Many Unanswered Questions (March 1998) at 39.

All of the above suggests that there are significant risks of partisan manipulation of the 2000 Census if statistical sampling is employed. Those risks underscore the need to enforce the headcount requirement imposed by the Constitution and federal law, a requirement imposed precisely to preclude the possibility of partisan manipulation.

## CONCLUSION

*Amici curiae* Washington Legal Foundation, *et al.*, respectfully request that the Court affirm the judgment of the district court.

Respectfully submitted,

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